No. _____

In The Supreme Court of the United States

ODYSSEY MARINE EXPLORATION, INC.,

Petitioner,

vs.

THE UNIDENTIFIED SHIPWRECKED VESSEL, its apparel, tackle, appurtenances and cargo located within center point coordinates, In Rem, THE KINGDOM OF SPAIN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE COMMON LAW DOCTRINE REQUIRING ACTUAL POSSESSION OF PROPERTY BY A FOREIGN SOVEREIGN CLAIMING IMMUNITY FROM A FEDERAL COURT ADJUDICATION OF ITS RIGHT TO THE PROPERTY HAS CONTINUED VITALITY UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT.

II. WHETHER A COURT WITHOUT SUBJECT MATTER JURISDICTION MAY TRANSFER PROPERTY TO A FOREIGN SOVEREIGN WHICH DID NOT HAVE POSSESSION OF THE PROPERTY AND NEVER PROVED OWNERSHIP.

III. WHETHER A COURT MUST DISTINGUISH VESSEL AND CARGO INTERESTS TO DETERMINE IF A FOREIGN SOVEREIGN'S ASSERTION OF IMMUNITY APPLIES WHEN THE CARGO IS PRIVATE BUT THE VESSEL IS PUBLIC.

LIST OF PARTIES

Petitioner

Odyssey Marine Exploration, Inc.

Respondent

The Kingdom of Spain

Claimants

Republic of Peru,
Gonzalo De Aliaga, the Count of San
Juan de Lurigancho,
Agustin De Aliaga, the Current Marques
de Zelada del Fuente,
Gonzalo Alvarez Del Villar,
Ignacio De Colmenares, the 11th Count of Polentinos,
Alberto Emilio Thiessen,
Enriqueta Pita Duthurburn,
Flora Leonor Perales Caldero De Colemnares,
Felipe Voyest,
Adela Armida De Izcue Bazo,
Carola Daireaux Kinsky,
Eleonora Daireaux Kinsky,
Matilde Daireaux Kinsky,
Julio Vega Eurasquin,
Inez Marquez Osorio,
Javier De Goyeneche the Current Count of
Guaqui And Marques De Villafuente,
Juan Mariano De Goyeneche Y Silvela, the
Current Marques Of Casa Dvaila,
Elsa Dorce Whitlock f/k/a Elsa Dorca Ruiz,
Santiago De Alvear,
Emilio De Alvear,
Maria Eugenia Solveyra,

LIST OF PARTIES – Continued

Alejandro Julian Pera Barthe,
Augustina Solveyra,
Ignacio Solveyra,
Dr. Jaime Durand Palacios,
Jose Antonio Rodriguez-Menendez
a/k/a Joseph Anthony Rodriguez.

RULE 29.6 DISCLOSURE

Odyssey Marine Exploration, Inc. does not have a parent corporation and no publicly held company owns 10% or more of the company's stock.

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OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (*App*. 1-51) is reported at *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011). The opinion of the district court (*App*. 52-103) is reported at *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126 (M.D. Fla. 2009).

STATUTORY PROVISION INVOLVED

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq*. provides in relevant part: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604.

The FSIA is reproduced at *App.* 116-143.

JURISDICTION

This Court has jurisdiction to review the Opinion of the Eleventh Circuit Court of Appeal on a petition for writ of certiorari pursuant to 28 U.S.C. § 1254. The Eleventh Circuit's Opinion was entered on September 21, 2011. On November 29, 2011, the Eleventh

Circuit denied Petitioner's Motion for Rehearing and Rehearing *En Banc*. *App*. 115. This Petition for Writ of Certiorari is timely filed within 90 days from that date. Sup. Ct. R. 13.

STATEMENT OF THE FACTS

Odyssey, a publicly traded American company, explores and recovers shipwrecks and cargo around the world. In March 2007, Odyssey discovered an underwater site consisting of silver and gold coins, as well as other objects, scattered on the bottom of the Atlantic ocean over 3,000 feet deep in international waters. Odyssey brought the recovered coins and artifacts into the physical jurisdiction of the Middle District of Florida for proper adjudication of any claims to the *res* (the coins and artifacts). The district court issued a warrant of arrest, which was duly executed, and granted Odyssey's motion to serve as substitute custodian of the *res*.[1] Odyssey seeks a reasonable salvage award or ownership under the law of finds. *App*. 8-9.

[1] Odyssey initially brought a portion of the *res* into the district. The execution of the warrant on that portion perfected *in rem* jurisdiction over it and constructive jurisdiction over the remainder of the *res* on the ocean floor. Odyssey then recovered the remainder of the *res* and brought it into the district to preserve actual *in rem* jurisdiction over the entire *res*, which is composed of approximately 594,000,000 silver and gold coins.

After Odyssey published timely notice of the arrest, Spain asserted a claim to that portion of the *res* that it owned. *App.* 151. The Republic of Peru and numerous other claimants (largely descendants of the owners of most of the *res*) intervened and asserted their respective interests in the *res*. *App.* 13. The descendants' claims were supported by a cargo manifest proving ownership. *App.* 151. At no time did Spain assert that it was in actual possession of the *res* prior to the arrest. Nonetheless, Spain intervened and moved to dismiss, asserting that the district court lacked subject matter jurisdiction over the *res*. *App.* 12.

In the motion to dismiss, Spain argued that the *res* belonged to it and was entitled to sovereign immunity under the FSIA.[2] Concurrently, Spain sought to vacate the arrest, terminate Odyssey's appointment as substitute custodian of the *res,* and "direct release to the custody of Spain of all artifacts taken from" the defendant site. In short, Spain claimed that the federal judicial system lacked jurisdiction over the treasure, yet asked the court to exercise jurisdiction by entering an order requiring Odyssey to convey the treasure to Spain. *App.* 12.

Although Odyssey and the other claimants argued that the FSIA did not apply because Spain did

[2] Although also a foreign sovereign intervening to bring a claim, Peru accepted the jurisdiction of the court and did not seek sovereign immunity.

not have possession of the *res*, the district court dismissed Odyssey's admiralty complaint for lack of subject matter jurisdiction and vacated the arrest. *App.* 145-149. The district court expressly determined that the FSIA applied and thus it had no jurisdiction in the case. *App.* 13. Inconsistently, however, it asserted just enough jurisdiction to order Odyssey to return the treasure to Spain. *Id.* The district court stayed the requirement to transfer the *res* to allow Odyssey to appeal to the Eleventh Circuit Court of Appeals, which Odyssey did. *App.* 14.

On appeal, Odyssey again argued that Spain did not have possession of the *res* and thus could not claim immunity from jurisdiction. *App.* 38. Odyssey cited numerous cases from this Court that required a foreign sovereign to have possession of the *res* for foreign sovereign immunity to apply, including authority from this Court decided after the FSIA was enacted. *App.* 38. It also cited authority from this Court holding that a court could not order disposition of the *res* absent jurisdiction over the *res*. *App.* 47.

The Eleventh Circuit affirmed. In doing so, it concluded that the FSIA "pre-empted" this Court's possession requirement, noting that this Court's authority regarding the possession requirement was rendered prior to enactment of the FSIA and was therefore inapplicable. *App.* 40. Specifically refusing to rule as to the ownership of the defendant *res* (although tacitly recognizing that the majority of the *res* belonged to private parties), the Eleventh Circuit held that the district court lacked jurisdiction over

the entire *res* pursuant to the FSIA, yet found that the district court had the jurisdiction to order the disposition of the *res* to Spain. *See App.* 47, n.16. The court also rejected Odyssey's position that the cargo should be treated separately from the vessel even if the vessel were immune under the FSIA. *App.* 41-42.

Odyssey sought rehearing and rehearing *en banc.* The Eleventh Circuit denied the requests. *App.* 115. Intending to seek review by this Court by petition for writ of certiorari, Odyssey moved the Eleventh Circuit to stay issuance of the mandate to preserve the *status quo.* On January 31, 2012, the Eleventh Circuit denied Odyssey's motion. Odyssey then filed a stay application with Justice Thomas, the Circuit Justice for the Eleventh Circuit, who denied the application on February 9, 2012.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit concluded that this Court's long standing precedent applying a possession requirement to foreign sovereigns claiming immunity from U.S. courts asserting jurisdiction over the sovereigns' property no longer applies under the FSIA. But after avoiding this Court's possession requirement and finding the district court without jurisdiction, the Eleventh Circuit inconsistently agreed that the district court had just enough jurisdiction to order the salvage operator to convey gold, silver and other artifacts worth an estimated $500 million to the

foreign sovereign without possession of it. Along with violating this Court's possession requirement, this result likewise contravenes the Court's longstanding rule of law that a court without jurisdiction cannot proceed at all. Once a court finds it is without jurisdiction, the only function remaining to the court is that of announcing the fact and dismissing the cause. While Petitioner recognizes this Court grants petitions for writ of certiorari only for compelling reasons, this Petition satisfies this requirement because the Eleventh Circuit's decision expressly conflicts with numerous decisions from this Court. Sup. Ct. R. 10(c).

Likewise, this Court should address this nationally compelling issue because, with the advent of new underwater technology,[3] more archaeological recoveries of shipwrecks and cargo are occurring around the world.[4] With the Eleventh Circuit's decision supporting them, foreign sovereigns without possession for hundreds of years will now conflictingly demand

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[3] *See Ne. Research, LLC v. One Shipwrecked Vessel, her Tackle, Equip., Appurtenances, Cargo*, 790 F. Supp. 2d 56, 65 (W.D.N.Y. 2011) (noting party's assertion that vessel could not have been discovered "without the advent of modern electronic search technology and innovations in diving technology").

[4] UNESCO estimates that there are over three million shipwrecks in the world. Soreide & Fredrik, *Ships from the Depths: Deepwater Archaeology*, 4 (2011). Some well-recognized authorities have projected that between 10% and 20% of all seagoing ships ever built sank in deep water. *Id.* at 5. The U.S. government has made federal grant money available for deep-sea archaeology. http://www.technologyreview.com/business/13158/

federal courts convey a salvage operator's find to them while arguing they are immune from the district court's jurisdiction for any adverse determination. The by-product of the foreign sovereigns' judicial shelter is to encourage the end of historical marine salvage as now practiced, with a return to a complete disregard for archaeology or the reporting of finds. This Court should exercise its discretion in favor of reviewing this case because the decision from the Eleventh Circuit not only conflicts with decisions from this Court but also addresses an important international issue that stands to frequently reoccur.[5]

I. THE COMMON LAW DOCTRINE REQUIRING ACTUAL POSSESSION OF PROPERTY BY A FOREIGN SOVEREIGN CLAIMING IMMUNITY FROM A FEDERAL COURT ADJUDICATION OF ITS RIGHT TO THE PROPERTY HAS CONTINUED VITALITY UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT.

The FSIA grants foreign states immunity from the jurisdiction of federal and state courts. *Republic*

[5] Indeed, just one month ago, salvage operators announced a discovery off the Cape Cod coast reported to exceed three billion dollars in platinum from the British vessel, the Port Nicholson, which was carrying a payment in platinum from the former Soviet Union to the U.S., when it was torpedoed by a German U-Boat. http://hosted2.ap.org/RIPRJ/f7ded15e4d4846268a17b79c1c4b7cb8/Article_2012-02-01-US-Ship-of-Platinum/id-710cb85572694b0cb3e2972d3443e9ac

of Austria v. Altmann, 541 U.S. 677, 681 (2004). The FSIA does not expressly state – one way or the other – whether a foreign sovereign may assert immunity when it is not in possession of the property which it claims.[6] While the FSIA may not address this issue expressly, the Eleventh Circuit refused to apply this Court's longstanding decisions mandating such a requirement under the common law.

In *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), decided over 20 years after the FSIA was enacted, this Court resolved whether the Eleventh Amendment implicitly contained a possession requirement. In affirmatively answering this question, this Court expressly stated:

> The Court's jurisprudence respecting the sovereign immunity of foreign governments has likewise turned on the sovereign's possession of the res at issue.

Id. at 507.

In this case, however, the Eleventh Circuit refused to apply the foreign sovereign possession requirement reaffirmed in *Deep Sea Research* because, it concluded, this Court's recognition of such a requirement of foreign sovereigns was not the "holding" of *Deep Sea Research*. In addition to *Deep Sea Research*, Odyssey cited other decisions from this Court

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[6] FSIA Section 1605(b) does *imply* a possession requirement in *in rem* admiralty proceedings such as the instant case.

that likewise turned on the foreign sovereign's possession of the property at issue. *See, e.g., Compania Espanola de Navegacion Maritima, S.A. v. The NAVEMAR*, 303 U.S. 68, 75-76 (1938) (holding that where a sovereign could not show possession over a ship, a federal court retained admiralty jurisdiction); *The Pesaro*, 255 U.S. 216, 219 (1921) (holding that a federal court's jurisdiction was not barred by mere suggestion of foreign government's ownership of vessel). Where a vessel is not in the possession of a sovereign, it is not immune from claims before a U.S. court. *See The NAVEMAR*, 303 U.S. at 75-76 (noting that a vessel, arguably the property of the Spanish government, was not immune from suit because "actual possession by some act of physical dominion or control in behalf of the Spanish government was needful, or at least some recognition on the part of the ship's officers that they were controlling the vessel and crew in behalf of their government") (internal citations omitted); s*ee also Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 710, n.7 (1982) (White, J., concurring in part and dissenting in part) ("The Court's consistent interpretation of the respective but related immunity doctrines pertaining to such vessels has been, upon proper presentation that the sovereign entity claims ownership of a *res* in its possession, to dismiss the suit or modify the judgment accordingly . . . .).

Despite the additional authority unequivocally applying the possession requirement to foreign sovereigns claiming immunity from litigation over its

purported property, the Eleventh Circuit characterized these decisions as pre-FSIA cases and thus inapplicable.[7] According to the Eleventh Circuit, the FSIA takes precedence over this Court's common-law possession requirement applicable to foreign sovereigns. Combining its belief that the FSIA trumps this Court's authority with its belief that this Court did not decide the issue in *Deep Sea Research*, the Eleventh Circuit rejected a FSIA foreign sovereign possession requirement.

The Eleventh Circuit incorrectly concluded that because the FSIA does not expressly reference a possession requirement, the common law requirement no longer exists. The Eleventh Circuit failed to realize that this Court has stated that the FSIA does not supersede or trump common law, but rather must be construed against its backdrop. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2290 (2010) (noting that a related purpose of enacting the FSIA was "codification of international law at the time of the FSIA's enactment," and that the Court has "examined the relevant common law and international practice when interpreting the Act"). In *Samantar*, this Court stated that "when a statute covers an issue previously

[7] The Eleventh Circuit overlooked that the FSIA was enacted in 1976. This Court decided *Deep Sea Researc*h in 1998 and it is not a pre-FSIA case. Moreover, this Court cited the relevant portion of *Deep Sea Researc*h with approval in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004), another post-FSIA case.

governed by the common law, we interpret the statute with the presumption that Congress intended to retain the substance of the common law." *Id*. at 2290 *citing Isbrandtsen Co. v. Johnson,* 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident").

Here, the Eleventh Circuit did not find any language or expression of a contrary intent to applying the foreign sovereign possession requirement. Indeed, to hold otherwise would be illogical. If, as the Eleventh Circuit found, possession is not an FSIA requirement, a party in a federal court action could never obtain jurisdiction over property in a salvage case where a foreign sovereign intervenes and merely claims an interest. By the very nature and definition of a lost or sunken treasure, no party possesses it until recovery. The Eleventh Circuit has effectively written into the FSIA immunity for a foreign sovereign in any salvage case in which it chooses to enter a claim. Congress evinced no intent of such a result in the plain language of the statute.

The Eleventh Circuit avoided the absence of contrary intent by relying on this Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). There, this Court stated that the FSIA "provides the sole basis for obtaining jurisdiction over a foreign state." *Id.* The Eleventh Circuit reasoned that because Congress did not

include the possession requirement as an exception, one does not exist. The court misunderstood Odyssey's argument. The possession requirement is not an exception to immunity, but simply a requirement of it. Without possession of the property, a foreign sovereign cannot satisfy its burden for asserting immunity.

The possession requirement is not simply Odyssey's invented incantation. Comity requires that when property is possessed by a foreign sovereign but brought into this country, it maintains the dignity and the independence of a nation. *Schooner Exchange v. McFaddon*, 11 U.S. 116, 145 (1812). But when identical property arrives in U.S. courts absent similar foreign possession, the same dignity and independence of the foreign sovereign does not attach. Such property is no different in substance than property owned by an ordinary citizen.

This Court has spoken on the possession issue and continues to recognize it post-FSIA; if the FSIA somehow implicitly overruled this Court's common law possession requirement, this Court, not the Eleventh Circuit, should make that decision. Because this international issue has significant impact beyond the parties to this lawsuit and will continue to be raised in other lawsuits of its kind, this Court should exercise its discretion to entertain jurisdiction over it.

II. A COURT WITHOUT SUBJECT MATTER JURISDICTION MAY NOT TRANSFER PROPERTY TO A FOREIGN SOVEREIGN WHICH DID NOT HAVE POSSESSION OF THE PROPERTY AND NEVER PROVED OWNERSHIP.

Spain was not hailed into this Court against its own volition. Spain ***intervened***, demanding the district court determine that it was without jurisdiction over the *res* that it claimed came from the MERCEDES. Paradoxically, Spain sought a determination that the recovered coins and artifacts belonged to it, and asked the district court to affirmatively order Odyssey to convey that property to Spain. After concluding that it had no jurisdiction under the FSIA, the district court nevertheless ordered Odyssey to convey the entire *res* it had recovered from the ocean bottom to Spain. The court did so even though Spain claimed only a part of the property, while much of the *res* was shown, without dispute, to belong to private parties.

This conclusion expressly and directly conflicts with this Court's ruling in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). There, this Court held that:

> [W]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

Id. at 94, *quoting Ex parte McCardle*, 74 U.S. 506, 514 (1868).

The Eleventh Circuit avoided this bedrock principle and affirmed the district court's order instructing Odyssey to deliver the property to Spain by employing this Court's holding in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008). Out of context, the Eleventh Circuit cited *Pimentel* regarding the "specific affront that could result" to a foreign state "if property they claim is seized by the decree of a foreign court." *Pimentel*, 553 U.S. at 866. Relying on that language, the Eleventh Circuit claimed that if the district court released the property to Odyssey, Spain would need to file suit against Odyssey to retrieve property allegedly protected by Spain's sovereign immunity.

Review of *Pimentel* shows the Eleventh Circuit took this language from *Pimentel* entirely out of context. In *Pimentel*, Philippine citizens alleging human rights abuse by former Philippine President Ferdinand Marcos sought assets Marcos allegedly stole while ruling his country to compensate for their injuries. Merrill Lynch, the holder of the stolen assets, filed an interpleader action in federal court to determine which of the various claimants were entitled to them. Concurrently, a Philippine court was determining the ownership of these assets. Nonetheless, Merrill Lynch joined in its interpleader lawsuit the Republic of the Philippines and the Philippine Presidential Commission on Good Governance, both of whom asserted foreign sovereign immunity under

the FSIA. After dismissing the Republic and Commission under the FSIA, the federal district court adjudicated their interests in the stolen assets. The Ninth Circuit affirmed this procedure. This Court accepted jurisdiction to determine the interplay between Federal Rule of Civil Procedure 19 and the FSIA.

In reversing the Ninth Circuit, this Court held that the district court could not decide the merits of the Republic and the Commission's claims to the stolen assets once the required entities had been granted sovereign immunity. *Id.* at 864. This Court recognized the inconvenience to all the parties resulting from an incomplete adjudication. Importantly, this Court never suggested that the appropriate remedy was to order the party in possession (Merrill Lynch) to turn over the stolen assets to the foreign sovereign. In fact, this Court left open the opportunity for further litigation to decide the parties' ownership rights of the stolen assets.

The Eleventh Circuit overlooked *Pimentel*'s actual holding, instead relying on out-of-context language. The Eleventh Circuit's analysis is thus improperly premised on nothing more than convenience of the parties – an analysis this Court rejected in *Pimentel* – and resulted in a practical determination of ownership. The district court in this case should have vacated its orders entered without jurisdiction and dismissed the lawsuit, leaving open the opportunity for further litigation.

Equally unpalatable is Spain's use of the FSIA as both a sword and a shield. In fact, the FSIA recognizes the potential for abuse and attempts to remedy it in 28 U.S.C. Section 1607 which creates an exception to immunity when a foreign sovereign files a claim in a lawsuit. Congress never intended a sovereign to affirmatively intervene in a federal court proceeding, and assert it was immune from claims that might hurt it, but at the same time demand that jurisdiction could be asserted to grant relief that helps it. "[I]f a foreign state brings or intervenes in an action based on a particular transaction or occurrence, it should not obtain the benefits of litigation before U.S. courts while avoiding any legal liabilities claimed against it and arising from that same transaction or occurrence." *Cabiri v. Gov't of Republic of Ghana*, 165 F.3d 193, 197 (2d Cir. 1999). Nothing in the FSIA grants a district court, in cases where there is no subject matter jurisdiction, the power to transfer possession of property to any party other than the one that had actual possession of it at the moment of arrest. The Eleventh Circuit's ruling to the contrary conflicts with this Court's precedent. Indeed, no U.S. court has ***ever*** denied subject matter jurisdiction and then ordered transfer of the subject property to a party who was neither in possession nor deemed to be the owner of that property.

III. COURTS MUST DISTINGUISH VESSEL AND CARGO INTERESTS TO DETERMINE IF A FOREIGN SOVEREIGN'S ASSERTION OF IMMUNITY APPLIES WHEN THE CARGO IS PRIVATE BUT THE VESSEL IS PUBLIC.

Even if the FSIA applied and the MERCEDES would be immune from arrest, the privately owned cargo it was once carrying is not immune from arrest. As early as 1822, this Court held that a foreign sovereign's assertion of immunity of a public vessel does not extend to private cargo, such as to oust the jurisdiction of U.S. courts sitting in admiralty. *The SANTISSIMA TRINIDAD*, 20 U.S. 283, 354 (1822) ("[W]hatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our Courts. . . ."). The Eleventh Circuit, however, treated private cargo aboard a military vessel differently. The court did not explain the reason for this different treatment, and failed to acknowledge that U.S. military vessels have never acted as commercial carriers. Instead, the Eleventh Circuit reviewed the Sunken Military Craft Act, Pub. L. 108-375, Div. A, Title XIV, §§ 1401-1408, 118 Stat. 2094 (2004), codified at 10 U.S.C. § 113 note (SMCA), and found the SMCA treats cargo as part of the shipwreck. Whatever the usefulness of the SMCA, it specifically requires that the government have title to the associated contents for the contents to be assimilated to the ship, which Spain does not have.

Referencing comity, the Eleventh Circuit also considered a potential injury to Spain's interest if cargo once aboard the MERCEDES was legally separated from the vessel. This might make sense if the bulk of the cargo were not privately owned, or perhaps if recovery of the cargo required interference with the vessel, but neither is the case here. A foreign sovereign has no sovereign interest in protecting private cargo. The fact that private cargo was once on a military vessel should not *ipso facto* immunize the cargo in an *in rem* action. Indeed, as this Court held, "[t]he characters of the vessel and cargo remain as distinct in this as in any other case." *The NEREIDE*, 13 U.S. 388, 431 (1815). This is particularly true when the private cargo was separated from the allegedly military vessel almost 200 years ago.

Nowhere in Spain's verified claim did it purport to assert ownership over cargo that was privately shipped or consigned on the MERCEDES. Principles of international comity would not be offended here in adjudicating the interests in private cargo once aboard the MERCEDES, and where Spain voluntarily came into the case to assert its alleged claim to the *res*.

In short, nothing prevents a federal admiralty court from adjudicating maritime claims involving private cargo even if it had been carried on a state-owned vessel. Given Spain's posture in this case as a claimant in an *in rem* proceeding, no "impermissibl[e] prejudice" would accrue to Spain.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 10-10269

D. C. Docket No. 8:07-cv-00614-SDM-MAP

ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff-Appellant,

versus

THE UNIDENTIFIED SHIPWRECKED VESSEL, its apparel, tackle, appurtenances and cargo located within center point coordinates, In Rem,

Defendant,

KINGDOM OF SPAIN,

Claimant-Appellee,

REPUBLIC OF PERU, GONXALO [sic] DE ALIAGA, the Count of San Juan de Lurigancho, AGUSTIN DE ALIAGA, the current Marques de Zelada del Fuente, GONZALO ALVAREZ DEL VILLAR, et al.,

Claimants.

No. 10-10317

D. C. Docket No. 8:07-cv-00614-SDM-MAP

ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff,

versus

THE UNIDENTIFIED SHIPWRECKED VESSEL, its apparel, tackle, appurtenances and cargo located within center point coordinates, In Rem,

Defendant,

GONZALO DE ALIAGA, the Count of San Juan de Lurigancho, AGUSTIN DE ALIAGA, the current Marques de Zelada del Fuente, GONZALO ALVAREZ DEL VILLAR, IGNACIO DE COLMENARES, the 11th Count of Polentinos, ALBERTO EMILIO THIESSEN, ENRIQUETA PITA DUTHURBURU, FLORA LEONOR PERALES CALDERON DE COLMENARES, FELIPE VOYEST, ADELA ARMIDA DE IZCUE BAZO, CAROLA DAIREAUX KINSKY, ELEONORA DAIREAUX KINSKY, MATILDE DAIREAUX KINSKY, JULIO VEGA EURASQUIN, INEZ MARQUEZ OSORIO, JAVIER DE GOYENECHE, the current Count of Guaqui and Marques de Villafuente, JUAN

MARIANO DE GOYENECHE Y SILVELA,
the current Marques of Casa Davila,

Claimants-Appellants,

KINGDOM OF SPAIN,

Claimant-Appellee.

No. 10-10318

D. C. Docket No. 8:07-cv-00614-SDM-MAP

ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff,

versus

THE UNIDENTIFIED SHIPWRECKED
VESSEL, its apparel, tackle,
appurtenances and cargo located
within center point coordinates, In Rem,

Defendant,

ELSA DORCA WHITLOCK,
f.k.a. Elsa Dorca Ruiz,

Claimant-Appellant,

KINGDOM OF SPAIN,

Claimant-Appellee.

No. 10-10319

ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff,

versus

THE UNIDENTIFIED SHIPWRECKED VESSEL, its apparel, tackle, appurtenances and cargo located within center point coordinates, In Rem,

Defendant,

REPUBLIC OF PERU,

Claimant-Appellant,

KINGDOM OF SPAIN,

Claimant-Appellee.

No. 10-10320

D.C. Docket No. 8:07-cv-00614-SDM-MAP

ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff,

versus

THE UNIDENTIFIED SHIPWRECKED VESSEL, its apparel, tackle, appurtenances and cargo located within center point coordinates, In Rem,

Defendant,

SANTIAGO DE ALVEAR, EMILIO
DE ALVEAR, MARIA EUGENIA
SOLVEYRA, ALEJANDRO JULIAN
PERA BARTHÉ, AGUSTINA SOLVEYRA,
IGNACIO SOLVEYRA,

Claimants-Appellants,

KINGDOM OF SPAIN,

Claimant-Appellee.

No. 10-10374

D.C. Docket No. 8:07-cv-00614-SDM-MAP

ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff,

versus

THE UNIDENTIFIED SHIPWRECKED
VESSEL, its apparel, tackle,
appurtenances and cargo located
within center point coordinates, In Rem,

Defendant,

DR. JAIME DURAND PALACIOS,

Claimant-Appellant,

KINGDOM OF SPAIN,

Claimant-Appellee.

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ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff,

versus

THE UNIDENTIFIED SHIPWRECKED VESSEL, its apparel, tackle, appurtenances and cargo located within center point coordinates, In Rem,

Defendant,

JOSE ANTONIO RODRIGUEZ-MENENDEZ, a.k.a. Joseph Anthony Rodriguez,

Claimant-Appellant,

KINGDOM OF SPAIN,

Claimant-Appellee.

Appeals from the United States District Court for the Middle District of Florida

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(September 21, 2011)

Before HULL, BLACK and STAPLETON,* Circuit Judges.

BLACK, Circuit Judge:

In 2007, Odyssey Marine Exploration, Inc. (Odyssey) discovered the remains of a 19th Century Spanish vessel in international waters west of the Straits of Gibraltar. Odyssey filed a verified admiralty complaint *in rem* against the shipwrecked vessel and its cargo in the Middle District of Florida and also sought a warrant of arrest. The Kingdom of Spain (Spain), the Republic of Peru (Peru), and twenty-five individuals filed claims against the *res.* Upon receiving additional information about the vessel's identity, Spain also filed a motion to dismiss. Spain argued, without waiving its sovereign immunity, that the *res* was a Spanish warship and the district court thus lacked subject matter jurisdiction over Odyssey's claims because the vessel was immune from judicial arrest under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611. The district court granted Spain's motion to dismiss, concluding the *res* was the shipwreck of a sunken Spanish warship and was entitled to sovereign immunity. Having determined that the *res* is "immune from . . . arrest" in United States courts, we affirm. 28 U.S.C. § 1609.

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* Honorable Walter K. Stapleton, United States Circuit Judge for the Third Circuit, sitting by designation.

I. BACKGROUND

Odyssey is a deep-ocean exploration and shipwreck recovery business. In 2006, Odyssey began what it called the Amsterdam Project, researching ships that sank in a heavily-traveled area, which included an area off the coast of Gibraltar. Odyssey developed a list of target vessels to search for, one of which was the *Nuestra Senora de las Mercedes* (*Mercedes*), a Spanish vessel that sank in 1804. According to Odyssey, it "recogniz[ed] that Spain may have had a cultural (if not legal) interest in vessels that may be located within the Amsterdam area, [and] invited Spain to participate in the project." Odyssey's Resp. to Spain's Motion to Dismiss, Dkt. 138 at 3. Odyssey's CEO and counsel then met with a representative from Spain's Ministry of Culture. What occurred at the meeting is disputed, but both Odyssey and Spain agree Spain did not give Odyssey approval to salvage any sunken Spanish vessels.

In March 2007, while Odyssey was surveying the Amsterdam area, Odyssey discovered a shipwreck in international waters 100 miles west of the Straits of Gibraltar at a depth of 1,100 meters. The remains of the shipwrecked vessel were spread over the seabed in an area 368 meters long and 110 meters wide. Odyssey conducted a detailed survey of the shipwreck before disturbing any artifacts on the ocean floor and then began to recover objects from the site. Odyssey ultimately recovered approximately 594,000 coins and a number of other small artifacts.

On April 9, 2007, Odyssey filed a verified complaint against "The Unidentified Shipwrecked Vessel, its apparel, tackle, appurtenances and cargo" in the Middle District of Florida. The complaint listed a possessory and ownership claim pursuant to the law of finds (Count One), as well as a salvage award claim pursuant to the law of salvage (Count Two).[1] It also noted Odyssey's intent to deposit with the court for symbolic arrest *in rem* a small bronze block recovered from the shipwreck.

On April 11, Odyssey filed a motion for an order directing the clerk to issue a warrant of arrest *in rem* against the shipwrecked vessel, its apparel, tackle, appurtenances, and cargo. Odyssey explained its intent to continue to recover artifacts from the site, and the motion provided that all artifacts and objects recovered would be turned over to the U.S. Marshal or to a substitute custodian appointed by the court for symbolic arrest *in rem*. Upon order of the magistrate judge, the clerk issued a Warrant of Arrest In Rem against the shipwrecked vessel and its apparel, tackle, appurtenances, and cargo. The warrant commanded the U.S. Marshal to take possession of the bronze block and any future artifacts recovered from the shipwrecked vessel. The court then issued an order appointing Odyssey as substitute custodian of

[1] The complaint also sought a declaratory judgment that no government had the authority to interfere with Odyssey's exploration or recovery of the vessel. This claim is not before us on appeal.

the shipwrecked vessel and any recovered artifacts "until further order of this Court."[2] Ord. Appointing Substitute Custodian at 2.

After Odyssey published a notice of arrest, Spain filed a verified claim to the vessel and its contents and cargo. On June 19, 2007, Spain filed a motion for a more definite statement and for disclosure of other information identifying the vessel and its contents. In the alternative, Spain sought an order dismissing the complaint, vacating the arrest, and terminating Odyssey's appointment as substitute custodian. Spain claimed Odyssey had not complied with the heightened pleading requirements for *in rem* complaints in admiralty, *see* Fed. R. Civ. P., Adm. Supp. R. C(2)(b), and had failed to provide information indicating the origin or nationality of the vessel and whether the vessel was a military ship or other sovereign property of a foreign nation. Spain stated that such information was relevant to the court's subject matter jurisdiction, as the property of a sovereign nation would be immune from arrest under the FSIA. In addition, Spain argued the details provided in the complaint were insufficient to allow Spain to determine whether to invoke sovereign immunity of the *res* from arrest.

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[2] The district court found Odyssey was "duly qualified to serve as the Substitute Custodian of artifact recovered from the Defendant Shipwrecked Vessel" and had "agreed to assume the responsibility of safekeeping the salvaged artifacts." Ord. Appointing Substitute Custodian at 2.

Odyssey responded by filing an amended complaint on August 6, 2007. It included the same *in rem* possessory and salvage claims as Odyssey's original complaint (Counts One and Two).[3] The amended complaint also stated Odyssey would present its Preliminary Site Assessment to the court under seal, and Odyssey would release information from the assessment to Spain as directed by the court. Odyssey claimed, however, it had "found no evidence which would confirm the identity of a ship or an interest of Spain or any other third party in this particular site." Amended Compl., Dkt. 21 at 6.

On September 19, 2007, Spain filed a motion to dismiss Odyssey's amended complaint, claiming Odyssey's *in rem* claims once again failed to meet the pleading requirements for admiralty actions *in rem*. Spain also asked the court to vacate the arrest and terminate Odyssey's appointment as substitute custodian. Although the district court ultimately denied this motion, it directed Odyssey to disclose certain information relating to the vessel's possible identity. In response to interrogatories from the court, Odyssey stated there was no confirmation the site represented any specific vessel, but disclosed it was considering

[3] Odyssey's amended complaint also raised *in personam* claims against Spain that did not appear in the original complaint. These *in personam* claims, as well as Odyssey's declaratory judgment claim raised in both the original and amended complaints, were later dismissed by the district court and are not at issue in this appeal.

the possibility the site was related to the Spanish vessel, the "*Nuestra Senora de las Mercedes y las Animas.*"

Upon this disclosure, Spain claimed the *Mercedes* was a Spanish Royal Navy Frigate that exploded and sank in combat in 1804 and was therefore subject to sovereign immunity from all claims or arrest in the United States pursuant to the FSIA. Spain accordingly filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) or, in the alternative, to grant summary judgment in Spain's favor pursuant to Fed. R. Civ. P. 56(a). Spain claimed it was "indisputable" the *res* was the *Mercedes,* "a warship of the Royal Navy of Spain which is subject to immunity from Odyssey's claims in this Court and is not subject to salvage against the wishes of Spain." Spain's Mot. to Dismiss or for Summary Judgment, Dkt. 131 at 1-2. Spain requested the Court dismiss the claims against the *res,* vacate the arrest, withdraw Odyssey's designation as substitute custodian, and direct that the artifacts in Odyssey's custody be turned over to the custody of Spain. Odyssey responded there was insufficient evidence to determine the *res* was the *Mercedes,* the FSIA was not a jurisdictional bar in this case, and sovereign immunity would not bar Odyssey's salvage claim. In addition, Odyssey argued that if, as Spain contested, the court did not have jurisdiction over the *res,* the court was without power to order the artifacts turned over to Spain.

The possible identification of the vessel as the *Mercedes* brought forward a number of additional claimants. Twenty-five claimants filed claims, arguing they had an interest in the cargo aboard the vessel. Twenty-four of the individuals alleged they were descendants of individuals with cargo aboard the *Mercedes,* and one individual claimed an ancestral interest in any of Spain's treasure in Florida. In addition, Peru filed a claim contending it had sovereign rights to property aboard the *Mercedes* that originated in its territory or was produced by its people.

On June 3, 2009, the magistrate judge issued a Report and Recommendation finding the *res* was the *Mercedes* and was the property of Spain. The magistrate judge concluded that under the FSIA the court was without jurisdiction to adjudicate the *in rem* salvage and possessory claims against the *Mercedes* and its cargo. The magistrate judge recommended the district judge grant Spain's motion to dismiss and direct Odyssey, as substitute custodian, to return the *res* to Spain.

Odyssey, Peru, and the descendant claimants objected to the magistrate judge's report. The United States filed a Statement of Interest as Amicus Curiae in Support of the Kingdom of Spain. It argued the United States had a treaty obligation to afford sunken Spanish warships the same protections and immunities from implied abandonment and uncontested access and salvage as a sunken United States warship would receive in United States courts.

The district court adopted the magistrate judge's report and recommendation in full on December 22, 2009. The district court dismissed Odyssey's amended complaint for lack of subject matter jurisdiction, vacated the *in rem* arrest, and ordered Odyssey to return the *res* to Spain. The order to return the *res* was stayed pending this appeal.

On appeal, Odyssey, Peru, and the twenty-five individual claimants contend the district court erred by: (1) failing to use a Rule 56 summary judgment standard when analyzing Spain's Rule 12(b)(1) motion to dismiss; (2) failing to conduct an oral evidentiary hearing before ruling on the motion to dismiss; (3) finding the *res* is the Spanish warship the *Mercedes* and holding the FSIA grants it sovereign immunity; (4) failing to distinguish between the *Mercedes* and the private cargo aboard; and (5) ordering the recovered *res* returned to Spain's custody.

II. STANDARD OF REVIEW

When evaluating a district court's conclusions on a Rule 12(b)(1) motion, "[w]e review the district court's legal conclusions *de novo* and its factual findings for clear error." *Carmichael v. Kellogg, Brown & Root Servs., Inc.,* 572 F.3d 1271, 1279 (11th Cir. 2009); *see also Lawrence v. Dunbar,* 919 F.2d 1525, 1530 (11th Cir. 1990) ("The usual standard of reviewing a district court's findings of jurisdictional facts is the clearly erroneous standard."). "As we have repeatedly held, the 'clearly erroneous' standard is

highly deferential." *Carmichael,* 572 F.3d at 1280. We must affirm the district court's determination "so long as it is plausible in light of the record viewed in its entirety." *Merrill Stevens Dry Dock Co. v. M/V YEOCOMICO II,* 329 F.3d 809, 816 (11th Cir. 2003) (quotation marks omitted); *see also Univ. of Ga. Athletic Ass'n v. Laite,* 756 F.2d 1535, 1543 (11th Cir. 1985) ("While the 'clearly erroneous' standard of review is less stringent than the well-known sports rule, 'The referee is always right,' it nevertheless presents a formidable challenge to appellants who . . . seek to overturn the factual findings of a district court.").

We review a district court's decision not to hold an evidentiary hearing for an abuse of discretion. *See Moran v. Kingdom of Saudi Arabia,* 27 F.3d 169, 171-72 (5th Cir. 1994) (reviewing a district court's failure to conduct an evidentiary hearing on a party's Rule 12(b)(1) motion for lack of subject matter jurisdiction under the FSIA for an abuse of discretion).

III. DISCUSSION

A. *Did the district court apply the correct standard in evaluating Spain's motion to dismiss?*

The district court evaluated Spain's Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction under the standard applied to Rule 12(b)(1) motions asserted on factual grounds. This Court has explained that when a party raises a

factual attack to subject matter jurisdiction – as opposed to a facial challenge based merely on the allegations in the complaint – the district court is not obligated to take the allegations in the complaint as true. *Carmichael,* 572 F.3d at 1279. Instead, the "court may consider extrinsic evidence such as deposition testimony and affidavits." It may independently weigh the facts and is not constrained to view them in the light most favorable to the non-movant. *Id.* Applying this standard, the district court weighed the facts and determined that the *res* was a sunken Spanish warship over which it lacked jurisdiction. As we explain in Part III. C. 1, we conclude the district court did not clearly err in its factual determinations.

Odyssey argues the district court should not have independently weighed the facts under the Rule 12(b)(1) standard, but instead should have evaluated the facts under the standard applied to a motion for summary judgment under Fed. R. Civ. P. 56. Under this standard, Odyssey asserts, the court should have viewed the evidence in the light most favorable to Odyssey and drawn all justifiable inferences in its favor. Odyssey argues the Rule 56 standard is necessary because a motion to dismiss implicates the merits of the underlying claim in the case.

This Court has explained "[w]hen the jurisdictional basis of a claim is intertwined with the merits [of the claim], the district court should apply a Rule 56 summary judgment standard when ruling on a motion to dismiss which asserts a factual attack on subject matter jurisdiction." *Dunbar,* 919 F.2d at

1530. "[J]urisdiction becomes intertwined with the merits of a cause of action when a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief." *Morrison v. Amway Corp.,* 323 F.3d 920, 926 (11th Cir. 2003) (citation and quotations omitted).

In this case, jurisdiction is not intertwined with the merits of the cause of action. Although the FSIA governs the subject matter jurisdiction of the federal courts to hear this case, Odyssey has two substantive claims for relief: an *in rem* salvage claim, which is governed by salvage law; and an alternate claim of possessory rights and ownership under the law of finds. Since the FSIA provides only subject matter jurisdiction, and is not the basis for Odyssey's substantive claims, the same statute does not provide the basis for both the subject matter jurisdiction of the court and the plaintiff's substantive claims for relief such that jurisdiction is intertwined with the merits of the claim. Although Odyssey contends the motion to dismiss implicates the merits of the underlying claim, that a lack of subject matter jurisdiction bars a party's claim does not mean the jurisdictional question is itself related to the cause of action. *See Moran,* 27 F.3d at 172-73. Accordingly, the district court correctly applied the Rule 12(b)(1) standard for factual challenges to jurisdiction to Spain's motion for dismissal.

B. *Should the district court have held an evidentiary hearing when ruling on Spain's Rule 12(b)(1) motion?*

Odyssey contends the district court erred by failing to conduct an evidentiary hearing when deciding the Rule 12(b)(1) motion. Odyssey claims it should have been given an opportunity to orally cross examine Spain's experts.

"When a party challenges subject matter jurisdiction, the court is given the authority to resolve factual disputes, along with the discretion to devise a method for making a determination with regard to the jurisdictional issue." *Id.* at 172; *see also Land v. Dollar,* 330 U.S. 731, 735, 67 S. Ct. 1009, 1011 n. 4 (1947) ("As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court." (quotation marks and citation omitted)). When resolving factual disputes underlying a Rule 12(b)(1) motion, a court "'may' consider oral evidence along with written, but an evidentiary hearing is not required." *Moran,* 27 F.3d at 173.

Both the magistrate judge and the district court had before them what the district court referred to as "an encyclopedic treatment of the issues attendant to this controversy." Spain's motion to dismiss, Odyssey's response and Spain's reply were accompanied by a combined total of 125 attachments, including affidavits of multiple historians, counter-affidavits,

copies of original Spanish documents from the Nineteenth Century with translations, photographs from the shipwreck site, and photographs of the artifacts recovered. Further, Odyssey introduced even more exhibits with its objections to the magistrate judge's report, including copies of original historical documents, translated documents, articles, and excerpts from histories. Each party had a full opportunity to present evidence, including the ability to present counter-affidavits. The district court did not abuse its discretion by evaluating Spain's Rule 12(b)(1) motion based on the extensive record before it.[4]

C. *Did the district court have subject matter jurisdiction over the res?*

The Constitution empowers the federal courts to hear "all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III § 2, cl. 1. "'An *in rem* suit against a vessel is . . . distinctively an admiralty proceeding, and is hence within the exclusive province of the federal courts.'" *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans,* 535 F.3d 1299, 1314 (11th Cir. 2008) (quoting *Am. Dredging Co. v.*

[4] Odyssey claims that *Chalwest (Holdings) Ltd. v. Ellis,* 924 F.2d 1011, 1014 (11th Cir. 1991), requires the district court to conduct an evidentiary hearing. The Court in *Chalwest* held "in a motion to dismiss for want of jurisdiction decided without an evidentiary hearing, the plaintiff must only present a prima facie case of jurisdiction to defeat the motion where it is the defendant's domicile that is at issue." *Id.* at 1013. No party's domicile is at issue here.

Miller, 510 U.S. 443, 446-47, 114 S. Ct. 981, 985 (1994)).

Although federal courts have the exclusive power to adjudicate *in rem* suits against a vessel, that power is dependent on the court's jurisdiction over the *res,* the property named as the defendant. *R.M.S. Titanic, Inc. v. Haver,* 171 F.3d 943, 964 (4th Cir. 1999) (citing *Pennoyer v. Neff,* 95 U.S. 714, 724 (1877), *overruled in part by Shaffer v. Heitner,* 433 U.S. 186, 97 S. Ct. 2569 (1977)). "Only if the court has exclusive custody and control over the property does it have jurisdiction over the property so as to be able to adjudicate rights in it that are binding against the world." *Haver,* 171 F.3d at 964. Therefore, when a party files an *in rem* complaint, the court issues a warrant for the arrest of the *res* and the *res* remains in the court's custody for the remainder of the proceedings. *Crimson Yachts v. Betty Lyn II Motor Yacht,* 603 F.3d 864, 868 (11th Cir. 2010); *see also United States v. $38,570 U.S. Currency,* 950 F.2d 1108, 1113 (5th Cir. 1993) ("No *in rem* suit can be maintained without a valid arrest of the *res* by the marshal.")

If the *res* at issue is the property of a foreign state, the federal courts only have jurisdiction to arrest the *res* if authorized by the FSIA. *See* 28 U.S.C. § 1609; *see also Beg v. Islamic Republic of Pakistan,* 353 F.3d 1323, 1324 (11th Cir. 2003) ("Federal courts have jurisdiction to hear claims against foreign governments only if authorized by the Foreign Sovereign Immunities Act."). Therefore, in order to determine if we have jurisdiction in this *in rem* action, we

must determine first whether the *res* at issue is the property of a foreign state, and second, if it is, whether the federal courts have jurisdiction over the *res* under the FSIA.

1. Is the *res* the shipwreck of the *Mercedes?*

Odyssey argues there was insufficient evidence for the district court to conclude the *res* was the *Mercedes*. After an extensive review of the record, we conclude the evidence before the district court supports its factual determination that the *res* is the shipwreck of the *Mercedes* for the purposes of sovereign immunity.

a. The *Mercedes* and its historical context

To determine whether the *res* is the *Mercedes* for the purposes of sovereign immunity, it is necessary to first understand the history of the *Mercedes* and the facts surrounding its final mission.[5] The facts surrounding the demise of the *Mercedes* are best understood in light of the geopolitical context of early 19th Century Spain.

Spain and Great Britain fought as allies against revolutionary France in the War of Convention from 1793 to 1795. In 1795, Spain signed the Peace of

[5] All of the following facts are in the record before the district court.

Basel with France, ending the hostilities between Spain and France. While they were technically at peace, Spain still feared French expansionism and France's stronger military and quickly entered into the Treaty of San Ildefonso with France on August 18, 1796. Under the treaty, Spain pledged support to France and became allied with France in its war against Great Britain. In 1800, Spain signed a second Treaty of San Ildefonso, reaffirming Spain's alliance with France. The second treaty also included significant Spanish concessions to France, including the cession of Louisiana by Spain to France. In March of 1802, France and Great Britain signed the Treaty of Amiens, which effected a short-lived peace between France and Great Britain, but did not abrogate Spain's alliance with France.

In 1803, Spain entered into a secret agreement with France where Spain agreed to pay France a large monthly sum equivalent to and in lieu of its military obligation to France under the Treaty of San Ildefonso. Spain hoped this agreement would allow it to maintain its alliance with France without provoking the British, thereby staving off a potential French invasion of Spain. However, Great Britain informed Spain it considered the financial support of France as grounds for attacking Spain.

In light of its extensive monetary obligations to France and the tenuous peace with Great Britain, Spain needed to marshal its funds and resources in peninsular Spain. Spain thus utilized the peace from the Treaty of Amiens as an opportunity to collect

funds from its various Viceroyalties. The Spanish *Generalisimo* of sea and land forces, Manuel Godoy, ordered warships be dispatched to the port of El Callao in Lima, part of the Spanish Viceroyalty of Peru, to collect and bring back to peninsular Spain specie[6] and other precious cargo. Following the *Generalisimo*'s orders, the Spanish Minister of the Navy dispatched two frigates of war to Lima, the *Mercedes* and the *Clara*.

The *Mercedes* was built by Spanish Navy engineers in 1788 at the Spanish Navy shipyard in Havana, Cuba. It had a distinguished naval career and took part in multiple military missions, including fighting against the British in both the Battle of the Cape of Saint Vincent in 1797 and in the defense of El Ferrol, Spain in 1800. It also conducted multiple missions transporting valuable Spanish effects, including transporting 500,000 *pesos fuertes* of the King and other valuables of Spanish citizens from the Spanish Viceroyalties of New Grenada and New Spain to peninsular Spain in 1798.

The *Mercedes* and the *Clara* set sail for Lima on February 27, 1803, from the Spanish naval base in El Ferrol. After stopping for repairs at the Spanish

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[6] "Specie" is defined as "[c]oin of the precious metals, of a certain weight and fineness, and bearing the stamp of the government, denoting its value as currency. Metallic money; *e.g.* gold or silver coins." Black's Law Dictionary 1398 (6th ed. 1990).

naval base in Montevideo, in present day Uruguay, the *Mercedes* reached Lima on August 7, 1803.

In Lima, the *Mercedes* took on board an extensive amount of specie and other cargo, including copper and tin ingots of the Royal Treasury, products of the Royal Revenue of Mails, proceeds of patriotic loans, ecclesiastic funds, military payroll and tree husks. It also took aboard specie of Spanish citizens. According to Spanish naval historians, it was an accepted practice at this time for a country to provide military transport for private property when the transport would pass through areas patrolled by hostile nations' warships. In all, the *Mercedes* was loaded with approximately 900,000 silver pesos, 5,809 gold pesos, and almost 2000 copper and tin ingots. The *Mercedes* was also loaded with two obsolete bronze cannons, commonly called culverins. The culverins were being returned to Spain for reuse of the bronze for other military purposes.

Shortly after the *Mercedes* arrived in Lima, the Viceroy of Peru was informed the Treaty of Amiens had been abrogated and France and Great Britain were once again at war. In light of the resumed hostilities between France and Great Britain, the *Mercedes*' departure from Lima was delayed. The *Mercedes* ultimately left Lima on March 31, 1804, along with the *Clara* and another Spanish Navy frigate, the *Asuncion.* The three ships stopped in Montevideo on June 5, 1804. There, the *Clara* and the *Mercedes* were placed under the command of Royal Navy Commander General Jose de Bustamente y

Guerra and joined a squadron of two other Spanish Navy frigates, the *Medea* and the *Fama.* The squadron thereafter consisted of four frigates: the *Mercedes,* the *Clara,* the *Medea,* and the *Fama.*

According to the official registry of the *Mercedes,* when it arrived at Montevideo its crew of 337 included eight Spanish naval officers, 63 marines, 69 artillerymen and gunners, 51 sailors, 103 sailors-in-training, and various other men performing different jobs aboard the ship. It was also armed according to Spanish Navy regulations for war frigates and carried 12-pounder and 6-pounder cannons, as well as 24-pounder and 3-pounder *obuses* or *pedreros.*[7]

The day before the squadron left Montevideo, the second in command of the squadron fell ill and had to be replaced. Captain Diego de Alvear, who was aboard the *Mercedes* and was returning to Spain with his family, was moved from the *Mercedes* to the *Medea* to replace the second in command. Captain Alvear's family, including his wife, four daughters, three sons, and one nephew, stayed aboard the *Mercedes.*

The squadron set sail from Montevideo for Cadiz on August 9, 1804. On the morning of October 5, 1804, when the Spanish squadron was only one day's sail from Cadiz, it was intercepted by a British

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[7] The exact number of cannons the *Mercedes* carried is disputed. Spain and one of Odyssey's experts claims the Mercedes carried 50 cannons, while another one of Odyssey's experts claims it carried only 33-40 cannons.

squadron. Four Royal British Navy ships, under the command of Commodore Graham Moore, had been sent by the British Navy Admiralty to intercept Spanish warships transporting treasure back to Spain. The Spanish frigates, having sighted the British frigates headed towards them, assumed a combat formation. A British officer was sent aboard the *Medea* and informed the Spanish that the British King had ordered the British Navy to detain the Spanish squadron and take it to England. The Spanish refused the British order, and what was to become known as the Battle of Cape Saint Mary soon commenced.

Only a few minutes after the battle began, the *Mercedes* exploded. Captain Alvear, whose family was aboard the *Mercedes,* later wrote "The *Mercedes* jumped through the air making a horrible racket, covering us [on the *Medea*] with a thick rain of debris and smoke." Except for fifty sailors, everyone aboard the *Mercedes* was killed, including Captain Alvear's entire family. The remaining three Spanish frigates surrendered and were taken by the British squadron to England. Partly as a consequence of the Battle of Cape Saint Mary, Spain declared war against Great Britain and entered into the Napoleonic Wars as an ally of France.

b. The *res* is the *Mercedes*

In this historical context, the entirety of the record evidence supports the district court's conclusion that

the *res* is the *Mercedes.* The *res* was found within the zone Spain had plotted as the likeliest area of the *Mercedes*' demise, and no other naval vessels matching the *Mercedes*' type sank within that zone during the same time period. The site, essentially a scattered debris field, is consistent with a vessel that exploded at the surface. Moreover, the composition of the examined sampling of coins found on the *res* matches that of the 900,000 mostly silver coins aboard the *Mercedes:* almost all the coins are silver; they were all minted in the late 18th and early 19th Centuries and none were minted later than 1804; and they were almost exclusively minted in Lima and Bolivia. The 17 cannons found at the site, consisting of 6- and 12-pounder cannons, match the type the *Mercedes* would have carried. The site contains at least one bronze culverin, matching the distinctive cannons the *Mercedes* was carrying to be recycled. The site also includes large quantities of copper and tin ingots, matching the large quantity carried by the *Mercedes,* and contains copper plates like those used to sheath the hull of the *Mercedes.*

Despite this evidence, Odyssey contends the artifacts recovered do not match the cargo of the *Mercedes.* It points out that the *Mercedes* was carrying 900,000 coins and 33-50 cannons, whereas Odyssey has only recovered 595,000 coins and seventeen cannons. We find this argument unconvincing. The failure to fully recover all artifacts carried by the *Mercedes* is understandable considering the *Mercedes* exploded at the surface, sank 1,100 meters, scattered

over a large area, and has been sitting on the ocean floor for more than 200 years.

Odyssey also argues the *res* cannot be the *Mercedes* because Odyssey did not find an intact vessel. Although it is undisputed the shipwreck site does not contain an "intact" vessel, this fact is not determinative. As one of Odyssey's own experts acknowledged, the site is consistent with a vessel that broke up at the surface and descended through the water. There is evidence of an actual vessel at the site, including copper plates like those used to sheath a hull. The site and thus the *res* is a shipwreck, even though no intact vessel was found.

Furthermore, Odyssey acknowledged when it found the shipwreck that it was the remains of a vessel. Odyssey filed both its original complaint against and a motion seeking the arrest of "The Unidentified Shipwrecked Vessel, its apparel, tackle, appurtenances and cargo." The district court, at Odyssey's request, issued a warrant for the arrest of "The Unidentified Shipwrecked Vessel, its apparel, tackle, appurtenances and cargo." Therefore, the evidence in the record fully supports the finding of the district court that the *res* is the *Mercedes* for the purposes of sovereign immunity.[8]

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[8] The fact that the *Mercedes* has been sitting on the ocean floor for over 200 years does not negate Spain's property interest in the shipwreck. Under the 1902 Treaty of Friendship and General Relations between the United States of America and Spain,

(Continued on following page)

2. Does the FSIA apply to the *Mercedes?*

As we previously noted, in order for the federal courts to have jurisdiction over this *in rem* action, we must first determine whether the *res* at issue is the property of a foreign state, and second, if it is, whether the federal courts have jurisdiction over it under the FSIA. The district court did not err in determining the *res* is the *Mercedes.* It is uncontested the *Mercedes* is the property of Spain. We must now determine if the district court correctly decided that FSIA immunity applies to the arrest of the *Mercedes.*

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shipwrecked "Spanish vessels, like those belonging to the United States, may only be abandoned by express acts." *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels,* 221 F.3d 634, 638, 642 (4th Cir.2000); *see also* Sunken Military Craft Act, Pub. L. No. 108-375, § 1406, 118 Stat. 1811, 2097 (2004) ("The law of finds shall not apply to . . . any foreign sunken military craft located in United States waters," and "[n]o salvage rights or awards shall be granted with respect to . . . any foreign sunken military craft located in United States waters without the express permission of the relevant foreign state."); Protection of Sunken Warships, Military Aircraft and Other Sunken Government Property, 69 Fed. Reg. 5647-01, 5648 (Feb. 5, 2004) (President Clinton's January 19, 2001, statement that the United States "recognizes that title to a United States or foreign sunken State craft, wherever located, is not extinguished by passage of time, regardless of when such sunken State craft was lost at sea"). The shipwreck of the *Mercedes* is thus unquestionably the property of Spain.

a. Section 1609 provides the *Mercedes* with presumptive immunity from arrest

Section 1609 of the FSIA states: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution except as provided in sections 1610 and 1611 of this chapter." 28 U.S.C. § 1609. The *Mercedes* is Spain's sovereign property that is within the United States. While the *Mercedes* itself is not within the United States, that alone does not defeat the court's ability to obtain jurisdiction over it. A court may have either actual or constructive possession over the *res. See The Brig Ann,* 13 U.S. 289, 291 (1815). A court can exercise constructive possession over a shipwreck when part of the shipwreck is presented to the district court. *See, e.g., California v. Deep Sea Research, Inc.,* 523 U.S. 491, 494, 118 S. Ct. 1464, 1467 (1998). A salvor is thus able to bring a shipwreck found in international waters constructively within a court's territorial jurisdiction by having a portion of the shipwreck within the jurisdiction. *R.M.S. Titanic, Inc. v. Haver,* 171 F.3d 943, 967-69 (4th Cir. 1999) (concluding a shipwreck found in international waters can "constructively" be considered within the jurisdiction of the district court, although the district court's sovereignty over the wreck is a "'shared sovereignty,' shared with other nations enforcing the same [law of all nations]"). Odyssey has deposited parts of the *Mercedes* with the

district court, constructively bringing the shipwreck within the court's territorial jurisdiction. Because this is an *in rem* action based on the arrest of sovereign property, § 1609 provides the *Mercedes* with presumptive immunity from arrest.

b. The *Mercedes* does not fall within any of the FSIA exceptions to *in rem* immunity

Because § 1609 provides the *Mercedes* with presumptive immunity from arrest on these facts, the only way a federal court can obtain jurisdiction is if an exception to § 1609 applies. Odyssey has the burden of overcoming the presumption that the *Mercedes* is immune from arrest. *See S & Davis Int'l, Inc. v. The Republic of Yemen,* 218 F.3d 1292, 1300 (11th Cir. 2000) ("To establish subject matter jurisdiction under the FSIA, a plaintiff must overcome the presumption that the foreign state is immune from suit in the United States' courts. . . . In order to overcome the presumption of immunity, a plaintiff must prove that the conduct which forms the basis of its complaint falls within one of the statutorily defined exceptions.") (citing *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607, 610-11, 112 S. Ct. 2160 (1992)). If Odyssey offers evidence one of the FSIA exceptions to immunity applies, the burden shifts to Spain to show, by a preponderance of the evidence, that the exception does not apply. *Id.*

Although §§ 1610 and 1611 are the only statutory exceptions to a sovereign property's immunity from arrest, *see* § 1609, Odyssey fails to invoke either of these exceptions. Because Odyssey has failed to satisfy its burden by proving that either § 1610 or § 1611 applies, we would normally end the analysis at this point. Odyssey, however, argues the *Mercedes* was engaged in commercial activity and is exempt from any FSIA protection by virtue of the FSIA's incorporation of existing international agreements that exempt commercial vessels from sovereign immunity. *See* 28 U.S.C. § 1609 (explaining that immunity from arrest is "[s]ubject to existing international agreements which the United States is a party at the time of enactment."). Specifically, Odyssey points to language in the 1958 Geneva Convention on the High Seas stating, "Ships owned or operated by a state and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State." Art. 9, *entered into force* Sept. 30, 1962, 13 U.S.T. 2312, 450 U.N.T.S. 11.[9] On its face, this language creates an affirmative grant of immunity to vessels engaged in "non-commercial service." It does not, as

[9] Odyssey also cites to the 1926 Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels, *entered into force* Jan. 8, 1937, 176, L.N.T.S. 199. However, as the United States has not ratified this Convention and was not a party to it at the time the FSIA was enacted, it would not apply under the terms of the FSIA. *See* 6B Benedict on Admiralty § 8-41 (Frank L. Wiswall, Jr. ed., 7th ed. 2011).

Odyssey contends, appear to create a commercial activity exception to § 1609's immunity to arrest. However, even if it did, this argument fails because the *Mercedes* was not engaged in commercial activity.[10]

The FSIA defines a "commercial activity" as: "[e]ither a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).[11] The Supreme Court acknowledged in *Weltover* that this definition "leaves the critical term 'commercial' largely undefined." 504 U.S. at 612, 112 S. Ct. at 2165. The Supreme Court clarified that an activity is commercial under the FSIA: "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it." *Id.* at 614, 112 S. Ct. at 2166. It elaborated:

> [B]ecause the Act provides that the commercial character of an act is to be determined

[10] Odyssey did not raise a commercial activity argument under § 1610, which provides for exceptions from attachment for property "used for a commercial activity in the United States," and would thus not apply. *See* 28 U.S.C. § 1610. Instead, Odyssey improperly invoked § 1605(b)'s commercial activity exception, which as we explain in Part III. C. 2. c., also does not apply.

[11] The 1958 Geneva Convention on the High Seas does not define "commercial."

> by reference to its 'nature' rather than its 'purpose,' 28 U.S.C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce,' *Black's Law Dictionary* 270 (6th ed. 1990).

Id. In *Guevara v. Peru,* this Court explained that "[w]e read *Weltover* to mean that '[a] foreign state is commercially engaged when it acts like an ordinary private person, not like a sovereign, in the market.'" 468 F.3d 1289, 1298 (11th Cir. 2006) (quoting *Hond. Aircraft Registry, Ltd. v. Gov't of Hond.,* 129 F.3d 543, 548 (11th Cir. 1997)).

Odyssey points to several facts suggesting the *Mercedes* was serving in a commercial capacity. Specifically, Odyssey claims the *Mercedes* was carrying goods and specie for freight, 75% of the cargo measured by value was privately owned, private merchants were charged a 1% freight rate to ship their goods aboard the *Mercedes,* and Spain was not at war when the *Mercedes* sunk. In addition, Odyssey argues the *Mercedes* was serving as a commercial transport vessel for the Spanish *Correos Maritimos* (Maritime Mail Service).

After reviewing the record evidence, we conclude the *Mercedes* was not "act[ing] like an ordinary

private person" in the marketplace. *See id.* At the time it sank, the *Mercedes* was a Spanish Navy vessel. According to the 1804 official registry of ships of the Royal Spanish Navy, the *Mercedes* was assigned to the Spanish Navy fleet based at El Ferrol as one of nine frigate class ships. It was under the command of a Spanish Navy captain both when it left El Ferrol and when it was sunk. It delayed its departure from Lima to comply with Spanish Navy orders to prepare for war with the British. The crew was made up of Spanish Navy officers, sailors and marines, its armament was the standard armament of Spanish warships, and Captain Alvear's family and servants were traveling with official authorization. It was also carrying a substantial amount of Spanish Government specie and cargo, including money at the Minister of the Treasury's disposal, war donations, and copper and tin ingots.

Although the *Mercedes* did transport private cargo of Spanish citizens for a charge, the transport was of a sovereign nature. According to Spanish naval historians, providing protection and safe passage to property of Spanish citizens was a military function of the Spanish Navy, especially in times of war or threatened war. This function was particularly important during the late 18th and early 19th Centuries, when ships traveling between Spain and its American Viceroyalties had to pass through areas patrolled by hostile nations' warships. Therefore, the *Mercedes* was "act[ing] . . . like a sovereign" by

transporting specie during a time of threatened war. *Guevara,* 468 F.3d at 1298.[12]

In support of its position that the *Mercedes* was engaged in commercial activity, Odyssey also contends the *Mercedes* was a part of the *Correos Maritimos,* an official entity of the Spanish government dedicated to handling and transporting mail. The *Correos Maritimos* generally consisted of small, fast and lightly armed vessels that sailed to Spain's overseas Viceroyalties from their home base in La Coruna, Spain. Spain presented ample evidence the *Mercedes* was not part of the *Correos Maritimos,* including: historical records listing the *Mercedes* as part of the Spanish Navy and a warship; records listing vessels that were part of the *Correos Maritimos,* which do not include the *Mercedes;* and records showing the *Mercedes'* orders came from the Minister of the Navy rather than the Minister of State, who controlled the *Correos Maritimos.* The district court did not clearly err in concluding the *Mercedes* was a warship and not part of the *Correos Maritimos.*

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[12] Odyssey argues the *Mercedes* cannot be a warship because Spain was not at war with the British when it was sunk. Odyssey has failed to point to any law supporting this argument. Further, this argument would negate the warship status of many sunken military vessels, including the *U.S.S. Arizona* at Pearl Harbor. A country need not be at war for a sunken navy vessel to be a warship, as countries have navies both during times of war and times of peace.

Because Spain was acting like a sovereign, not a private person in the marketplace, we conclude the *Mercedes* was not conducting commercial activity and is immune from arrest under the FSIA.

c. Section 1605(b) does not apply to the *Mercedes*

Odyssey also attempts to circumvent § 1609 by arguing that § 1605(b), which refers to the immunity of a foreign state from claims when a suit is brought to enforce a maritime lien, provides this court with jurisdiction. This interpretation is inconsistent with the plain language of the FSIA.

The FSIA establishes two broad grants of immunity, which apply to different types of claims and are subject to different sets of exceptions. Section 1609, which we have explained applies to Odyssey's *in rem* claims, provides the *property* of a foreign state with immunity from arrest, attachment, and execution and states that exceptions are provided in §§ 1610 and 1611. 28 U.S.C. § 1609. In contrast, § 1604 provides immunity to the foreign *state itself* and states that exceptions are provided in §§ 1605 to 1607. 28 U.S.C. § 1604. The structure of the statute and the clear language of § 1609 and § 1604 thus preclude reading § 1605(b) to control the *in rem* arrest in this case. *See Mangattu v. M/V IBN HAYYAN,* 35 F.3d 205, 209 (5th Cir. 1994) (stating the plain language of § 1609 precludes reading the language of §§ 1605 and 1606 to control an issue of attachment).

Section 1605(b) is an exception only to the general immunity of the foreign state itself from claims under § 1604 and thus does not apply to Odyssey's *in rem* claims against Spain's property. 28 U.S.C. § 1604.

d. The FSIA does not contain a possession requirement

Finally, Odyssey posits the *Mercedes* is not immune from arrest because the FSIA only applies when sovereign property is in the sovereign's possession, and Spain was not in possession of the *res.* This argument does not rest on any language in the statute, but on Odyssey's interpretation of *California v. Deep Sea Research,* 523 U.S. 491, 118 S. Ct. 1464 (1998), and *Aqua Log, Inc. v. Georgia,* 594 F.3d 1330 (11th Cir. 2010), two cases that addressed the sovereign immunity of a state's property under the Eleventh Amendment. Odyssey claims these cases establish a sovereign may claim immunity in an *in rem* admiralty action only when the sovereign is in possession of the *res.*

We note first that neither of these cases contain any holding regarding the immunity of a foreign sovereign's property. Rather, these cases concerned state property and the Eleventh Amendment. *See Deep Sea Research,* 523 U.S. at 494, 507-08, 118 S. Ct. at 1467, 1473 (holding the Eleventh Amendment does not bar jurisdiction over vessels that are not in the State's possession and stating the case "requires us to address the interaction between the Eleventh

Amendment and the in rem admiralty jurisdiction of the Federal Courts"); *see also Aqua Log,* 594 F.3d at 1335 (holding the Eleventh Amendment does not bar jurisdiction over a case where Georgia claimed to own logs sunk at the bottom of a river that were not within Georgia's actual possession). Regardless of any possession requirement the courts have imposed on a U.S. state claiming immunity of its property, there is no support to conclude these cases alter the immunity Congress specifically provided to property of foreign states under the FSIA.

Moreover, it is clear we look only to the FSIA to determine if any possession requirement exists. Subject matter jurisdiction of the "lower federal courts is determined by Congress in the exact degrees and character to which Congress may seem proper for the public good." *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 433, 109 S. Ct. 683, 688 (1989) (quotation marks omitted). Congress has mandated "[c]laims of foreign states to immunity should [ ] be decided by courts . . . in conformity with the principles set forth in [the FSIA]." 28 U.S.C. § 1602. The Supreme Court has made clear the FSIA "provides the *sole basis* for obtaining jurisdiction over a foreign state." *Amerada Hess Shipping Corp.,* 488 U.S. at 443, 109 S. Ct. at 693 (emphasis added); *see also Verlinden B.V. v. Cent. Bank of Nigeria,* 461 U.S. 480, 497-98, 103 S. Ct. 1962, 1973 (1983) (stating "deciding whether statutory subject matter jurisdiction exists under the Foreign Sovereign Immunities Act entails an application of the substantive terms of

the Act to determine whether one of the *specified* exceptions to immunity applies") (emphasis added).

An examination of the FSIA reveals no possession requirement exists in any part of the statute.[13] When Congress determined "the exact degree [ ] and character" of subject matter jurisdiction over the property of foreign sovereigns under the FSIA, it did not provide an exception to immunity for property not in a foreign sovereign's possession. *Amerada Hess Shipping Corp.,* 488 U.S. at 433, 109 S. Ct. at 688.

Finally, Odyssey, as well as Peru, cites to *Compania Espanola De Navegacion Maritima, S.A. v. The Navemar,* 303 U.S. 68, 58 S. Ct. 432 (1938), as holding a foreign government cannot claim sovereign immunity over a vessel not in its possession.[14] *The Navemar* was decided before the FSIA was enacted. Even if cases prior to the enactment of the FSIA imposed a possession requirement, the FSIA preempts any prior possession requirement. *See Amerada Hess Shipping Corp.,* 488 U.S. at 443, 109 S. Ct. at 693 (stating the FSIA "provides the *sole basis* for

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[13] Odyssey asserts the FSIA contains a possession requirement in § 1605(b). As we have previously stated, § 1605 does not apply because it is an exception to the sovereign immunity of a foreign state provided by § 1604, whereas immunity here is granted under § 1609. *See* 28 U.S.C. § 1604. Regardless, an examination of § 1605(b) shows it does not impose a possession requirement.

[14] We do not address whether this is an accurate representation of *The Navemar*'s holding.

obtaining jurisdiction over a foreign state") (emphasis added); *see also* H.R. Rep. 94-1487, at 12 (1976) (noting the FSIA "is intended to preempt any other State or Federal law (excluding applicable international agreements)"). We hold FSIA immunity applies regardless of whether the property of a foreign sovereign is in that sovereign's possession at the time of arrest.

D. *Is the cargo aboard the Mercedes severable from the shipwreck of the Mercedes in determining immunity?*

Odyssey, Peru, and all twenty-five individual claimants assert that even if the *Mercedes* is immune from arrest, the cargo aboard the *Mercedes,* and therefore the treasure that has been salvaged from the shipwreck, is not immune. The individual claimants argue they have a right to the cargo because they are descendants of those who had an interest in cargo on the *Mercedes,* and Peru claims it has a patrimonial interest in cargo that originated in its territory. Together, they argue the treasure is not immune because the cargo aboard the *Mercedes* is private property that is severable from the shipwreck. Indeed, Peru's and the individual claimants' entire arguments regarding their rights to the treasure are premised on the notion that the cargo, not the shipwreck, is the relevant *res.*

No party has pointed us to any case or statute that directly answers the question of whether cargo

aboard a sunken military vessel is entitled to the same sovereign immunity as the sunken vessel. None of the cases cited by Odyssey in support of its argument that cargo is separate from a vessel concern cargo aboard a sunken military vessel.

As we discuss below, we are persuaded that in the context of a sunken Spanish military vessel, the cargo and the shipwreck are interlinked for immunity purposes. Two reasons support this conclusion: first, other statutes governing shipwrecks, including the Sunken Military Craft Act (SMCA), Pub. L. No. 108-375, §§ 1401-08, 118 Stat. 1811, 2094-98 (2004), which would govern the salvage claims against the *Mercedes,* treat cargo as part of the shipwreck; and second, the principles of comity discussed in the Supreme Court's decision in *Republic of the Philippines v. Pimentel,* 553 U.S. 851, 128 S. Ct. 2180 (2008), lead us to consider the potential for injury to the interest of the sovereign.

1. Cargo treated as part of the shipwreck

In 1902, the United States and Spain signed a treaty mandating "[i]n cases of shipwreck . . . each party shall afford to the vessels of the other, whether belonging to the state or to individuals, the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases." 1902 Treaty of Friendship and General Relations Between the United States of America and Spain, art. X, July 3, 1902, 33 Stat. 2105. Under this

treaty, the United States must afford the *Mercedes,* as a shipwrecked Spanish warship, the same protection it would give a shipwrecked United States military vessel.

The United States considers the cargo of a shipwrecked U.S. military vessel part of the shipwreck and gives it the same immunities as the shipwreck. Under the SMCA, the rights, title and interest of the United States in any sunken military craft are protected absent an "express divestiture of title." § 1401, 118 Stat. at 2094. The definition of a "sunken military craft" includes a sunken warship or other military vessel, as well as "all or any portion of . . . the associated contents of a craft." § 1408(3)(C), 118 Stat. at 2098. "Associated contents" are defined as "the equipment, *cargo,* and contents of a sunken military craft that are within its debris field . . . [and] the remains and personal effects of the crew and passengers of a sunken military craft that are within its debris field." § 1408(1), 118 Stat. at 2097 (emphasis added). Thus, under the 1902 treaty, the *Mercedes* and its cargo are entitled to the same immunities provided by the SMCA.

Treating the cargo as part of the shipwrecked *Mercedes* is also consistent with the Abandoned Shipwreck Act (ASA), Pub. L. 100-298, § 2102(d), 102 Stat. 432 (1988). Under the ASA, the Federal Government asserts and transfers title of any "abandoned shipwreck" to the state in whose submerged lands the wreck is embedded. Like the SMCA, the ASA defines "shipwreck" as "a vessel or wreck, its *cargo* and other

contents." *Id.* (emphasis added); *see also* U.S. Dep't of Interior, National Park Service Abandoned Shipwreck Act Guidelines, 55 Fed. Reg. 50116-01, 50121 (Dec. 4, 1990) ("Any cargo aboard a vessel entitled to sovereign immunity also generally remains the property of the flag nation unless the cargo had earlier been unlawfully captured by that nation."). Therefore, under the ASA, the cargo that was aboard the *Mercedes* would not be considered separate from the shipwreck.[15]

While the SMCA and the ASA do not state cargo is part of the vessel for immunity purposes, they show the protections awarded to a sunken sovereign vessel also extend to the cargo aboard that vessel. As evidenced by the SMCA, those protections

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[15] In addition, a site where the remains of a vessel are strewn on the ocean floor is still a shipwreck even if an intact vessel no longer remains. Our conclusion is based on the plain meaning of "shipwreck," which is defined as "a ship's wreckage." *See* Black's Law Dictionary 1504 (9th ed. 2009) (citing 4 James Kent, Commentaries on American Law at 323 n. (b) (George Comstock ed., 11th ed. 1866) (stating a shipwreck includes a vessel which "is dashed to pieces")). Under its plain definition, a shipwreck covers not only a sunken intact vessel, but also a vessel that was "dashed to pieces" or exploded at the surface and then sank to the ocean floor. Our plain-meaning interpretation of "shipwreck" is supported by statutory definitions.

Furthermore, Odyssey filed both its original complaint against and a motion seeking the arrest of "The Unidentified Shipwrecked Vessel, its apparel, tackle, appurtenances and cargo." The district court, at Odyssey's request, issued a warrant for the arrest of "The Unidentified Shipwrecked Vessel, its apparel, tackle, appurtenances and cargo."

are heightened when the sunken vessel is a military vessel. We grant the cargo on a sunken Spanish military vessel the same sovereign immunity protection we grant the vessel.

2. The promotion of Spain's comity interest

Granting the cargo on a sunken Spanish military vessel the same sovereign immunity protection as the vessel is also consistent with the heightened protection we grant sovereigns when there is a potential of injury to the sovereign's interest. In *Pimentel,* the Republic of the Philippines and a sovereign Filipino Commission were dismissed as defendants in an interpleader action pursuant to the FSIA. 553 U.S. at 859, 128 S. Ct. at 2186. The action concerned various parties' claims against assets in a Merrill Lynch brokerage account, which included funds allegedly illicitly obtained by an ex-President of the Philippines. *Id.* at 857, 128 S. Ct. at 2185. After the Philippines and the Commission were dismissed, the district court awarded the assets to another party, reasoning the Philippines' and the Commission's claims against the assets had so little likelihood of success on the merits that the action could proceed without them. *Id.* at 860, 128 S. Ct. at 2187. The Supreme Court reversed, concluding that when a sovereign that is a required party in an interpleader action asserts sovereign immunity and raises non-frivolous claims, "dismissal of the action must be ordered where there is a potential for injury to the interest of the absent sovereign." *Id.* at 867, 128 S. Ct. at 2191. The Court explained

that in failing to dismiss the action, the district court failed to give full effect to sovereign immunity and the promotion of the comity interest that underlies that doctrine. *Id.* at 865-66, 128 S. Ct. at 2190. It stated the "Republic and the Commission have a unique interest in resolving the ownership of or claims to the [] assets," and a "specific affront [] could result to the Republic and the Commission if the property they claim is seized by the decree of a foreign court." *Id.* at 866, 128 S. Ct. at 2190.

While *Pimentel* is factually distinguishable, we find its reasoning instructive. The same "promotion of the comity interest" that led the Supreme Court to dismiss the action in *Pimentel* compels this Court to treat the cargo and the *Mercedes* as one for sovereign immunity purposes. *Id.* There is an undeniable potential for injury to Spain's interest if we separated the *Mercedes* from its cargo and upheld an arrest of the cargo found and salvaged from a warship that is entitled to immunity. The silver coins and all other artifacts Odyssey has salvaged and flown to Tampa came from the *Mercedes.* While various parties may have cognizable claims against parts of the recovered *res,* even by Odyssey's own estimate approximately 25% of the cargo, measured by value, was Spanish government property. Moreover, Spain has an even greater interest in the sovereign immunity of its sunken warships. Thus, the FSIA immunity from *in rem* suits in U.S. courts given to the *Mercedes* applies to the shipwreck as a whole, including the cargo, even

if such cargo was owned by private individuals or has been salvaged from the wreck.[16]

Because the cargo aboard the *Mercedes* is treated as part of the shipwreck of the *Mercedes* for sovereign immunity purposes, the *Mercedes*' immunity precludes Peru's attempt to institute an action in United States courts against any part of the *Mercedes* or any cargo it was carrying when it sank. This applies whether or not Peru has a patrimonial interest in the cargo. This also applies to the claims against the *res* by the twenty-five individual claimants.[17]

E. *Did the district court err when it ordered the res released to the custody of Spain?*

The district court vacated the arrest and ordered Odyssey, as the substitute custodian, to return the recovered *res* to Spain. Odyssey argues this order serves as a substantive ruling on the merits that is beyond the district court's power because the court lacks subject matter jurisdiction. Odyssey contends the court is only empowered to return the parties to their positions prior to the arrest of the *res* and, therefore, the recovered *res* should be returned to

[16] We do not hold the recovered *res* is ultimately Spanish property. Rather, we merely hold the sovereign immunity owed the shipwreck of the *Mercedes* also applies to any cargo the *Mercedes* was carrying when it sank.

[17] This holding is limited to the facts in this case, where the cargo was found aboard a sunken active duty Spanish military vessel and was legally placed aboard the vessel.

Odyssey because Odyssey was in possession of the *res* immediately prior to the arrest. It argues the district court's order "transferred" the property from Odyssey to Spain, which the district court had no authority to do. We disagree.

When this action was initiated, Odyssey filed a motion for an order directing the clerk to issue a warrant of arrest *in rem* against the shipwrecked vessel, its apparel, tackle, appurtenances, and cargo. Odyssey stated "[a]ny further artifacts recovered from the Defendant Shipwrecked Vessel will be recovered under the jurisdiction of this Court, and will be within the actual and/or constructive possession of this Court or its duly-appointed substitute custodian during the pendency of this action." Odyssey's Verified Complaint in Admiralty In Rem at 4-5, Dkt. 1. The court issued a Warrant of Arrest In Rem against the shipwrecked vessel and its apparel, tackle, appurtenances, and cargo. The warrant commanded the U.S. Marshal to take possession of the *res* and any future artifacts recovered from the shipwrecked vessel. The district court appointed Odyssey as substitute custodian of the shipwrecked vessel and any recovered artifacts "until further order of this Court." Ord. Appointing Substitute Custodian at 2, Dkt. 8.

By virtue of the issuance of the arrest warrant, the court is currently in possession of approximately 594,000 recovered coins and other artifacts. It necessarily follows that the court, after determining the *res* was immune from arrest, must have the ability to release the *res* from its custody. A contrary conclusion

would lead inexorably to court custody *in perpetuity*. We have determined the arrest of the recovered *res* must be vacated, and therefore the district court must now release the property.

The Fed. R. Civ. P. Supplemental Admiralty Rules provide little instruction on how a court should release previously arrested property when the court does not have subject matter jurisdiction over the property. Supplemental Rule E(5)(d) states "the property arrested shall be released only by order of the court, on such terms and conditions . . . as the court may require." The rule does not state to whom the *res* should be released, only that it should be released according to the "terms and conditions" best seen fit by the court.

We note, the release from custody sought by Odyssey would not, as Odyssey contends, return matters to the status quo at the commencement of this suit. The U.S. Marshal seized the *res* approximately one month after Odyssey discovered the site in March of 2007. Odyssey continued recovery operations after the order of arrest. While Odyssey may have had prior custody of some items from the site, the remainder of the recovered *res* was received in Odyssey's capacity as custodian for and under the authority and protection of the court.

Moreover, releasing the *res* to the custody of Spain is not, as Odyssey attempts to characterize it, a "transfer." Odyssey holds the *res* as a substitute custodian of the district court; the *res* remains *in*

custodia legis (in the court's possession). By ordering Odyssey, as substitute custodian, to release the *res* into Spain's custody, the court is relinquishing its control of the *res* and releasing it to the party that has a sovereign interest in it. Further, Spain's sovereign interest in the *res* existed before Odyssey initiated this action and deposited the parts of the *res* it had salvaged from the shipwreck.

In fact, releasing the *res* to Odyssey rather than Spain would be inconsistent with Spain's rights under the 1902 Treaty of Friendship and General Relations between the United States of America and Spain. As discussed previously, this treaty requires the United States to extend to Spanish shipwrecked vessels the same protection and immunities afforded to its own shipwrecked vessels in similar circumstances. 1902 Treaty of Friendship and General Relations Between the United States of America and Spain, art. X, July 3, 1902, 33 Stat. 2105. The United States protects its sunken warships from unauthorized private party access and possession. *See* SMCA, §§ 1402(b), 1408, 118 Stat. 2094. Thus, the 1902 Treaty requires the *Mercedes* be afforded the same protection and immunities from unauthorized access and salvage.

Finally, the Supreme Court's reasoning in *Pimentel,* which led us to conclude the cargo recovered from the *Mercedes* must receive the same sovereign immunity protection as the *Mercedes* itself, also supports our decision to affirm the district court's order to release the *res* into Spain's custody. The Supreme Court noted the "specific affront that could result" to

a foreign state "if property they claim is seized by the decree of a foreign court." *Pimentel,* 553 U.S. at 866, 128 S. Ct. at 2190. The same affront would result here if the *res,* which the district court improperly arrested, was then released to Odyssey. This would force Spain to file suit against Odyssey to retrieve property that is protected by Spain's sovereign immunity.

For the foregoing reasons, the district court did not err when it ordered Odyssey to release the recovered *res* to the custody of Spain.

IV. CONCLUSION

We AFFIRM the district court's grant of Spain's motion to dismiss.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff,

v.

UNIDENTIFIED, SHIP-WRECKED VESSEL,

Defendant,

KINGDOM OF SPAIN, et al.,

Claimants. /

CASE NO: 8:07-cv-614-T-23MAP

ORDER

A September 25, 2008, order (Doc. 134) refers Spain's motion to dismiss (Doc. 131) and motion to vacate the arrest warrant (Doc. 132) to the United States Magistrate Judge for a report and recommendation. Following the Magistrate Judge's June 3, 2009, report and recommendation (Doc. 209), Odyssey, the Republic of Peru, and the individual claimants object (Docs. 227, 228, 229, 230, 231, 234). Spain responds (Docs. 236, 237) in opposition to the objections, and the objectors reply (Docs. 260, 261) in suport of the objections. With leave, the United States submits a Statement of Interest (Doc. 247), to which Odyssey, Peru, and the individual claimants respond (Doc. 259, 262).

In sum, the papers of Spain supporting the two referred motions, together with the array of papers opposing or otherwise evaluating the referred motions from several distinct vantages, constitute an encyclopedic treatment of the issues attendant to this controversy, which combines a compelling episode in naval history, the singular law that governs nations in their society on the sea, the intriguing prospect of recovering great wealth lost in connection with international conflict, the objective of respectful and reliable preservation of warships and their occupants and cargo lost at sea, and the troubling question of the plight of both persons and natural resources subject to colonial exploitation.

Over many days, I reviewed painstakingly both the Magistrate Judge's report and recommendation and each paper informing the several objections. Upon completion of that review, I considered composing an opinion analyzing the report and recommendation and resolving each objection. However, I have concluded in view of the meticulous and insightful report and recommendation that a separate opinion by the district judge will add only length and neither depth nor clarity (and certainly not finality) to this dispute. In any event, after a lengthy and somewhat trying review of the papers in this case, my only important opinion is that the Magistrate Judge is both eminently correct in his evaluation and highly accomplished in his presentation of the proposed result.

In particular, I note my emphatic agreement (1) with the Magistrate Judge's application of Rule 12(b)(1) as the proper standard for reviewing the facts pertinent to a determination of subject matter jurisdiction and (2) with the Magistrate Judge's conclusion that no genuine, plausible claim persists that the site at issue is anything other than the site of the wreck of the Spanish naval vessel *Nuestra Señora de las Mercedes*. Finally, I note my emphatic agreement with both the Magistrate Judge and Spain, which states at page twenty-one of the response (Doc. 236) that:

> Odyssey's rehash of "commercial activity" arguments conspicuously fails to acknowledge that the exception expressly applies only to "property used for a commercial activity in the United States," if it "is or was used for the commercial activity upon which the claim is based." 28 U.S.C. §§ 1610(a), 1610(a)(2). Moreover, the FSIA defines "commercial activity in the United States" as "commercial activity carried on by such state and having substantial contact with the United States." 23 U.S.C. § 1603(e). It is undisputed that the *Mercedes* had nothing to do with the United States: "the *res* lacks any nexus to our nation's sovereign boundaries." (R&R at 29)
>
> . . . .
>
> To defeat a showing of sovereign ownership and invocation of the FSIA, the claimant must show its claims are based on commercial activity by the vessel in the United

States and/or a waiver of sovereign immunity. Odyssey has done neither.

I have reviewed with particular interest and admiration the statement on behalf of Peru by Professor John Norton Moore of the University of Virginia School of Law, who offers a provocative and scholarly elaboration of his observation that this case is not "about sovereign rights over wrecks . . . or the dispute between salvors and sovereigns" but "as between Peru and Spain this case is about future custody of property physically, culturally and historically originating in Peru." Professor Moore advances the aspirational notion that cultural, historical, and archaeological "linkage" is "the crucial linkage for recognizing sovereign state interest." I have studied with care the appealing formulae detailed by Professor Moore and tested the applicability of those formulae as tools of decision in this case. Although I recognize the appeal of the legal principles Professor Moore advances and the responsiveness of those principles to considerations of justice in resolving a dispute between Peru and Spain, I conclude that the principles are not the governing tools of decision in this case in the United States district court (although the principles articulated by Professor Moore may govern in another forum on another day in resolving Peru's challenge to Spain's retention of the disputed items).

The ineffable truth of this case is that the *Mercedes* is a naval vessel of Spain and that the wreck of this naval vessel, the vessel's cargo, and any human

remains are the natural and legal patrimony of Spain and are entitled in good conscience and in law to lay undisturbed in perpetuity absent the consent of Spain and despite any man's aspiration to the contrary. That the *Mercedes* is now irreparably disturbed and her cargo brought to the United States, without the consent of Spain and athwart venerable principles of law, neither bestows jurisdiction on the United States to litigate conflicting claims of ownership (to all or part of the cargo) nor empowers the United States to compel the sovereign nation of Spain to appear and defend in a court of the United States.

Conclusion

A *de novo* review of those portions of the report and recommendation to which Odyssey, Peru, and the individual claimants object reveals that the objections either are unfounded or otherwise require no different resolution of Spain's motions. Accordingly, the objections (Docs. 227, 228, 229, 230, 231, 234) are **OVERRULED**, and the Magistrate Judge's report and recommendation (Doc. 209), a copy of which is attached to, and incorporated into, this order, is **ADOPTED**. Spain's motion to dismiss (Doc. 131) and motion to vacate the arrest warrant (Doc. 132) are **GRANTED**. The amended complaint (Doc. 25) is **DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION**, and the warrant of arrest is **VACATED**. The claims (Docs. 13, 120, 136, 157, 164, 168, 169, 175, and 176) to the *res* are **DISMISSED FOR LACK OF SUBJECT MATTER**

JURISDICTION. The Clerk is directed (1) to enter judgment of dismissal for lack of subject matter jurisdiction as to the amended complaint (Doc. 25) and as to each claim to the *res* (Docs. 13, 120, 136, 157, 164, 168, 169, 175, and 176); (2) to terminate any pending motion; and (3) to close the case. Finally, the substitute custodian, Odyssey, is ordered to return the *res* to Spain within ten days under the circumstances and in a manner subject to approval by the Magistrate Judge. However, the order to the substitute custodian to return the *res* is **STAYED**, the order vacating the arrest warrant is **STAYED**, and the status quo of the *res* shall persist until the earlier of (1) the day after the Eleventh Circuit Court of Appeals issues a mandate in this case or, (2) if no party appeals, the expiration of the time to notice an appeal.

ORDERED in Tampa, Florida, on December 22, 2009.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES
DISTRICT JUDGE

cc: US Magistrate Judge
Courtroom Deputy

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff,

v.

THE UNIDENTIFIED SHIPWRECKED VESSEL, if any, its apparel, tackle, appurtenances and cargo located within a five mile radius of the center point coordinates provided to the Court under seal,

Defendant, *in rem*

and

THE KINGDOM OF SPAIN, THE REPUBLIC OF PERU, *et al.*,

Claimants. /

Case No. 8:07-CV-614-SDM-MAP

REPORT AND RECOMMENDATION

This *in rem* action involves competing claims over a shipwreck (the *res*) Odyssey discovered in international waters off the Straits of Gibraltar. Although the parties dispute the *res*'s identity, Spain claims it is the *Nuestra Señora de las Mercedes*, a

Spanish frigate that exploded in a pivotal 1804 engagement with the British and precipitated Spain's declaration of war against Britain. Accordingly, Spain moves to dismiss the matter on grounds this Court is without subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). *See* 28 U.S.C. § 1602 *et seq.*; Fed. R. Civ. P. 12(b)(1). Having carefully considered the parties' detailed submissions, I conclude the *res* is the *Mercedes*, that none of the exceptions to the FSIA apply, and that as such this Court is without jurisdiction to adjudicate the claims against Spain's property. Therefore, I recommend the district judge grant Spain's motion to dismiss the complaint for the reasons stated below.[1]

A. Background

Odyssey Marine Exploration Inc. ("Odyssey") bills itself as "the world's leader in deep-ocean shipwreck exploration and recovery." (Doc. 138 at 3.) As part of its business model, the firm extensively investigates its targets, and so it did with the *Mercedes*. By 2006, Odyssey listed the *Mercedes* with thirty other shipwrecks of interest (the "Amsterdam Project"). All carried valuable cargo, and all were suspected of meeting their demise along a heavily traveled area. In November 2006, Odyssey representatives met with

[1] The district judge referred the matter to me for a report and recommendation. (Doc. 20) *See* 28 U.S.C. § 636; Local Rule 6.01(b).

an official from Spain's Ministry of Culture seeking Spain's consent to recover and sell artifacts from shipwrecks of historical or cultural interest to Spain. Although the participants now have different views about the meeting, all agree Spain failed to give Odyssey explicit approval.[2]

In March 2007, Odyssey discovered the *res* in international waters about 100 miles west of the Straits of Gibraltar at a depth of approximately 1100 meters.[3] (Doc. 138, Ex. A-1 at 5.) It recovered an artifact (a small bronze block), symbolically deposited that item with the Court, and filed this *in rem* action. Based on Odyssey's submissions and per Supplemental Rule C(3), this Court directed the clerk to issue a warrant of arrest against "the Unidentified, Shipwrecked vessel, its apparel, tackle, appurtenances and cargo." (Docs. 3, 5.) Per the operative complaint, Odyssey now demands under the law of finds possessory rights and ownership over the items it has recovered and that remain at the salvage site;

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[2] Spain convincingly asserts that by the mid November 2006 meeting, Odyssey knew Spain considered the *Mercedes* a naval vessel. (Doc. 163 at 12.) Odyssey counters saying its experts had opined the *Mercedes* had primarily provided commercial services. (Doc. 138 at 23-25.) Irrespective, the meeting put Odyssey on notice that Spain had not abandoned its sovereignty of the *Mercedes* nor given express approval to Odyssey's commercial venture into Spanish shipwrecks.

[3] In its public pronouncements, Odyssey named its find *The Black Swan*.

alternatively, under the law of salvage, the firm seeks "a liberal salvage award" for its services.[4] (Doc. 25.)

Two sovereigns and twenty-five descendants of those aboard the *Mercedes* have filed claims against the *res*. Spain's position is straightforward: the *res* is unquestionably the remnants of the *Mercedes*; Spain has not abandoned its sovereignty of the vessel, particularly one of such historical significance; under applicable treaties and Executive Branch directives, Spain's warship should be accorded the same respect as those of the United States; and this Court is without subject matter jurisdiction over the *res* under the FSIA. The Republic of Peru, which did not exist as a sovereign in 1804, asserts a "conditional claim" to "all of its property and patrimony," namely that specie minted in or produced from ore extracted from Peruvian territory. In sum, Peru argues this Court should "address the competing claims of Peru and Spain before reaching the question of whether either or both nations have sovereign immunity from the claims of

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[4] The law of salvage and the law of finds are mutually exclusive. *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 961 (4th Cir. 1999). Under the law of salvage, a rescuer takes possession, but not title to, the distressed vessel and its contents, and can obtain an award for services rendered. The law of finds takes a more direct approach to ownership – "finders keepers." *International Aircraft Recovery, L.L.C. v. Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255, 1258 (11th Cir. 2000). By asking the Court to apply the law of finds, Odyssey essentially seeks a judicial declaration that would give it exclusive title against the world to artifacts located on a plot of Atlantic seabed over 4,000 miles from this district.

Odyssey." (Doc. 141 at 3.) Odyssey, in turn, levels a scattershot argument: the *res* is not a shipwreck at all; the *res* is not the *Mercedes*; the *res* is an amalgamation of shipwrecks none of which is the *Mercedes*; and if it is the *Mercedes*, the FSIA does not apply for a variety of reasons. From this brew, two core questions surface: is the *res* the *Mercedes* and, if so, is Spain entitled to sovereign immunity? In the main, answering the former answers the latter.

*B. Evidentiary Perspective*s

Although Odyssey and Spain have pored over the same evidence, they offer different conclusions about the *res*'s identity. The requisite review standard guides the Court's perspective for sifting through their differences. Spain's FSIA attack is a factual challenge to the Court's subject matter jurisdiction. *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990) (a facial attack requires the court to accept plaintiff's allegations as true and determine if the complaint sufficiently alleges a basis for subject matter jurisdiction; a factual attack on subject matter jurisdiction is an attack on the trial court's "very power to hear the case"); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000) (FSIA challenges the court's very power to hear the case; hence, the court has the authority to resolve factual disputes as to its application using a variety of methods: discovery, affidavits, evidentiary hearing, and weighing testimony). Rule 12(b)(6)'s presumption of truthfulness does not attach to Odyssey's allegations.

In short, a factual attack under Rule 12(b)(1) allows a court to proceed as it never could under Rules 12(b)(6) or 56 – it is free to independently weigh the facts. The existence of disputed material facts will not preclude it from evaluating for itself the merits of the jurisdictional claims. *Morrison v. Amway Corp.*, 323 F.3d 920, 924-925 (11th Cir. 2003); *see also Scarfo v. Ginsberg*, 175 F.3d 957, 961 (11th Cir. 1999) ("When faced with factual disputes regarding subject matter jurisdiction, the district court serves as the fact-finder and may weigh the evidence, provided that the challenge to subject matter jurisdiction does not implicate an element of the cause of action.").[5]

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[5] Odyssey seemingly promotes Rule 56's more stringent review standard: a court should examine the evidence in the light most favorable to the non-movant (Odyssey) and draw all justifiable inferences in its favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). As noted, this counters Rule 12(b)(1)'s freedom to weigh and evaluate conflicting evidence. But even under Rule 56, once the moving party has satisfied its initial burden under the rule, the nonmoving party must show that a genuine issue of material fact remains and not just some "metaphysical doubt" as to these facts. *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Odyssey seeks to create doubt about the wreck's identity through the use of a logical fallacy, "denying the antecedent." However, "[t]he proposition that 'A implies B' [Spain's argument] is not the equivalent of 'non-A implies non-B' [Odyssey's argument], and neither proposition follows logically from the other." *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 702 n. 20 (2d Cir. 1980) (citing J. Cooley, *A Primer of Formal Logic* 7 (1942)).

C. Facts

1. historical

The historical prelude to the *Mercedes*'s fateful, October 5, 1804, encounter with a British squadron near Cape Saint Mary, Portugal is well documented and is the obvious starting point for correlating the *res* to the *Mercedes*. Within a decade, Spain fought with the British against revolutionary France (*Guerra de la Convención* or War of the Convention – 1793-1795); ended those hostilities with the Peace of Basel (1795); quickly signed another treaty pledging support to France (Treaty of San Ildefonso – August 1796); and reaffirmed this alliance in a second treaty that demanded it cede Louisiana to France (Second Treaty of San Ildefonso – 1800). (Doc. 131, Ex. C ¶¶18-19.) In 1802, after years of constant strife, the European powers settled into a temporary respite with the Treaty of Amiens. (Doc. 131, Ex. C ¶ 20.) But this lull did not allay Spain's concerns about France. Fearing France's invasion, yet knowing that Britain would consider Spain's actions a cause for attack, Spain sought to appease France by secretly agreeing to pay a monetary subsidy in lieu of furnishing the military aid required by the first Treaty of San Ildefonso. (Doc. 131, Ex. C ¶¶ 21-22.) In short, Spain needed all its resources for these tumultuous times; accordingly, it dispatched frigates to collect "specie and precious produce" from its American Viceroyalties. (Doc. 131, Ex. A at ¶¶ 15-16.) One was the *Mercedes*. (Doc. 131, Ex. A at ¶ 15.) By the time the *Mercedes* reached El Callao (near Lima, Peru), France and

Britain were already at war. (Doc. 131, Ex. A at ¶ 14; Doc. 131, Ex. C at ¶ 24.) Madrid's June 8, 1803, dispatch to the Viceroy of Peru (the Marquis of Avilés) captures the fluidity of the political events:

> The political circumstances in Europe and the declared War between England and France require every Commander of the King's vessels to increase their care and vigilance to be prepared just in case H[is] M[ajesty] found himself in the difficult circumstance of taking part in this [conflict] . . . ; but in the meantime and to not endanger the existing specie in that Realm and give time to examine the state that European political affairs are acquiring, as prudence dictates, H[is] M[ajesty] has found it proper to resolve that Y[our] E[xcellency] suspend the departure from Callao of the frigates, *Asuncion*, *Clara*, and *Mercedes*, which have gone [there] for specie . . . .

(Doc. 131, Ex. C at ¶ 24.)

The following summer, the *Mercedes* and three other frigates (the *Clara*, the *Medea*, and the *Fama*), set out from Montevideo bound for Cádiz. (Doc. 131, Ex. C at ¶¶ 27-28.) Spain undoubtedly anticipated a conflict with the British. (Doc. 131, Ex. C at ¶ 27.) On the morning of October 5, 1804, only a day's sail from Cadiz, a British squadron forewarned of the mission intercepted the four frigates south of Cape Saint Mary. (Doc. 131, Ex. A at ¶ 23; Doc. 138, Ex. E at Annex 27.) The British demanded their surrender; the Spaniards refused.

> As soon as the [British] officer returned with an unsatisfactory answer, I fired another shot a-head of the Admiral, and bore down close on his weather-bow. At this moment the Admiral's second a-stern fired into the *Amphion*; the Admiral fired in to the *Indefatigable*; and I made the signal for close battle, which was instantly commenced with all the alacrity and vigour of English sailors. In less than ten minutes, *la Mercedes*, the Admiral's second a-stern, blew up along-side the *Amphion*, with a tremendous explosion.

Captain Graham Moore, *Indefatigable*[6]

The force of the blast blew part of one of her quarterdeck guns into the *Amphion's* rigging.[7] More than 250 perished, including its Captain (José Manuel Goycoa) and the family of Second Squadron Leader Diego de Alvear. (Doc. 131, Ex. A at ¶¶ 9, 25.) The remaining Spanish frigates surrendered, were taken to Great Britain, and impounded. (Doc. 131, Ex. A at ¶ 26; Doc. 131, Ex. D at ¶ 19.) Two months later, Spain declared war against Britain and sealed its fate by an allegiance to France. (Doc. 131, Ex. A at ¶ 27.)

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[6] *The Naval Chronicle, The Contemporary Record of the Royal Navy at War*, 1804 – 1806, at 74 (Nicholas Tracy ed., Chatham Publishing 1999). (Doc. 131, Ex. D, Annex 3.)

[7] *The Naval Chronicle for 1804*, at 500. (Doc. 131, Ex. D, Annex 6.) The British attributed the cause of the massive explosion to the Spanish Navy's "dangerous method of loading their guns, which is by a shell from a cask where the powder is kept loose." *Id.*

2. identity

Odyssey set out to find the *Mercedes* and found it. Yet, despite conceding "[its] leading hypothesis is that the recovered cargo came from the *Mercedes*," Odyssey argues this Court should still entertain doubt because "at the current level of site reconnaissance and study, there is no definitive archaeological evidence and all evidence pointing toward that theory remains circumstantial." (Doc. 138 at 7.) This argument is wrong for three reasons. It ignores the applicable standard of proof (preponderance of the evidence) and instead promotes something bordering on proof beyond a reasonable doubt. It distinguishes direct (i.e., "definitive") evidence from circumstantial evidence, a proposition that wholly ignores an axiomatic legal principle – circumstantial evidence and direct evidence are indistinguishable. *Holland v. United States*, 348 U.S. 121, 140 (1954) (circumstantial evidence is "intrinsically no different" from direct evidence); *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960) ("circumstantial evidence is not only sufficient, but may also be more certain, satisfying, and persuasive than direct evidence"); Eleventh Circuit Pattern Jury Instructions (Civil) (2005), Basic 2.1, 2.2, 2.3 ("The law makes no distinction between the weight you may give to either direct or circumstantial evidence."). And lastly, it minimizes the overwhelming circumstantial evidence pointing to the *Mercedes* – the location, coins, cannons, and artifacts.

a. location

Based on the records of the *Mercedes*'s sister frigates, Spain plotted the likeliest area of her demise; the *res* lies within this zone. No other naval vessel matching her type, according to Spain, sank within this zone during this period. Indeed, even one of Odyssey's own experts (Sinclair) admits the "extant documents place the *Mercedes* in the area" of the site. (Doc. 138, Ex. B at 20.) Despite this concession, Odyssey nevertheless argues the *res*'s location does not match that suggested by some historical accounts or research. For example, at least one individual reported land to be visible when the *Mercedes* went down (none can be seen according to Odyssey from the site even with the aid of binoculars). (Doc. 138, Ex. D at ¶ 11; Doc. 138, Ex. A-1 at 61.) An Italian naval historian (Claudio Bonifacio) claims he discovered the *Mercedes* off Portugal in 1982. (Doc. 138, Ex. A-1 at 61-62.) None of this is remotely persuasive. These offhand contentions do not meet the basic reliability demands set out in Rule 56(e) or Fed. R. Evid. 702. Besides, none of this can be squared with Spanish or British logs of the time. *See* Doc. 163, Ex. A at ¶ 9 (per British logs and Captain Moore's report to the Admiralty, the Spanish warships were more than 20 miles south of Cape Saint Mary when they moved *south* to intercept the Spanish squadron; the location where Bonifacio claims he discovered the *Mercedes* is ten miles from the Portuguese coast).

b. coins

The *Mercedes* was loaded with approximately 900,000 coins from El Callao and Montevideo. (Doc. 131, Ex. H at ¶ 16.) The mix overwhelmingly favored silver to gold; in fact, the *Mercedes* only carried a few hundred gold coins. (Doc. 131, Ex. H at ¶ 16.) Coincidentally, Odyssey recovered: approximately 594,000 coins; with an overwhelming disparity of silver to gold; dating from the latter half of the 18th century to no later than 1804; all of Spanish nationality; and minted almost exclusively in the "South American Spanish Crown Colonies" and the mint in Lima in particular. (Doc. 131, Ex A at ¶ 39 & Annex 33; Doc. 131, Ex. D at ¶ 119; Doc. 131, Ex. H at ¶ 12.) Confronted with this parity, Odyssey challenges the relevancy, or denies the correlation, or offers other explanations: Spain's sampling (2,000 to 5,000) was too small to be relevant for proving they came from the *Mercedes* (although Odyssey possesses the coins, it has not presented any proof contradicting Spain's sampling); the 594,000 coins could have come from another vessel because Spanish coins were acceptable currency throughout the commercial world; or since ships of the 17th to 19th centuries carried up to 30 percent more specie than officially reported, Odyssey should have discovered more coins if the wreck were the *Mercedes*. (Doc. 138, Ex. A-1 at 52; Doc. 138, Ex. B at 5; Doc. 138, Ex. H at 5, 7; Doc. 138, Ex. I at 4.) These arguments, which simply advance metaphysical doubt, are not persuasive. *Matsushita*, 475 U.S. at 586.

c. cannons

The 17 cannons found at the site match the type the *Mercedes* would have carried:

> Iron and bronze cannon at the site are naval pattern iron and bronze guns of a size and style that identify the shipwreck as a Spanish warship, and specifically a warship of the late 18th or early 19th century. The iron cannon visible in the videotapes and photographs are smoothbore, muzzle-loading guns of the late 18th century . . . . The size and shape of the iron guns indicate that they are 6 to 12-pdr. cannon. This corresponds with the principal armament of *Mercedes* . . . . [A]t least 17 individually identifiable cannon have been noted.

(Doc. 131, Ex. D at ¶ 97.) The *Mercedes* also carried two other distinctive cannons, not as weapons but as cargo. Per a manifest, two *cañones de bronce inútilies* ("useless bronze cannons") were loaded onto the vessel at El Callao to be ferried to Cadíz. (Doc. 131, Ex. D at Annex 7.) Another contemporaneous report confirmed this using a slightly different description, *dos culebrinas excluidas de bronce* (two discarded bronze culverins). (Doc. 131, Ex. D at Annex 17 at 4.) By 1804, these items were obsolete as weaponry. (Doc. 131, Ex. D at ¶ 106.) Their value was in their metal, bronze, which could be melted to manufacture artillery, sheathing for warships, and other military hardware. (Doc. 131., Ex. C at ¶ 25.) The site

includes two culverins, a fact Spain contends makes identification certain. I agree.[8]

Again, Odyssey proposes explanations other than the obvious: naval historians and marine archaeologists view cannons as "very weak" indicia of a ship's nationality and date because they were "extensively traded and distributed commodities"; the bronze *pedreros*/*obuses* at the site are very close in style to a series of late 18th century English bronze cannons without handles; the dolphin handles seen on the culverins at the site are not diagnostically Spanish; and 17 cannons at the site are fewer than the 33 to 40 that she likely carried.[9] (Doc. 138, Ex. A-1 at 4, 22, 25; Doc. 138, Ex. B at 18.) These contentions, perhaps reasonable in the abstract, are not persuasive here because they suggest as the more

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[8] Although Spain asserts the site shows both culverins, Odyssey maintains only one was discovered. (Doc. 138, Ex. A-1 at 23.) Irrespective, the discovery of even one is highly probative of the vessel's identity.

[9] There is some dispute as to the number of cannons the *Mercedes* carried and apparent at the site. One of Odyssey's experts (Sinclair) opined the frigate would have had 33 to 40 and of those 17 are accounted for. Spain and another Odyssey expert (Kingsley) puts the *Mercedes*'s number at 50 cannons with 17 (Spain) or 18 (Kingsley) apparent from the available evidence. *Compare* Doc. 138, Ex. B at 18, *with* Doc. 131, Ex. A at ¶ 22, Doc. 131 Ex. D at ¶ 97, and Doc. 138, Ex. A-1 at 23. Irrespective, the 17 or 18 the parties have identified are consistent with the type the *Mercedes* would have carried, and I do not find Odyssey's argument – that its failure to find more cannons means the vessel is not the *Mercedes* – persuasive.

reasonable hypothesis the unlikely proposition that these obsolete cannons, especially when found with cannons the *Mercedes* would have typically carried, were there by happenstance. Besides, Odyssey's argument that cannons are weak indicators is based on examples predating the standardization of naval ships and their armament that had occurred during the 18th century, a standardization that was "well in place by the time of *Mercedes*." (Doc. 163, Ex. A at ¶ 13.)

d. other artifacts

The *Mercedes*, according to historical records, carried "large quantities of copper and tin ingots for 'His Majesty' . . . when it sank." (Doc. 131, Ex. A at ¶ 38; Doc. 131, Ex. D at ¶ 25.) The site includes large quantities of copper and tin ingots. (Doc. 131, Ex. D at ¶ 120.) The *Mercedes*'s hull was sheathed with copper plates like those found at the site. (Doc. 131, Ex. A at ¶ 34.) Some of the debris and artifacts show evidence of a violent explosion. (Doc. 131, Ex. D at ¶¶ 90-96.) Even one of Odyssey's experts concedes the "scattered debris field" is "consistent with a vessel that has broken up at the surface, descended through the water column and spilled out the cargo and various components onto the seabed." (Doc. 138, Ex. B at 8.)

3. finding

The debris field's location, coins, cannons, and artifacts persuasively match the *Mercedes*'s historical record. That Odyssey, which set out to discover the *Mercedes*, found this mix strewn about in an area a few football fields square where the vessel met its explosive ending makes the conclusion even more compelling. The *res* is the *Mercedes*.[10]

D. Discussion

1. admiralty principles, international waters, and patrimonial interests

To the casual observer, it might seem odd that a federal court in this district would be tasked with adjudicating salvage claims to the remnants of a centuries-old shipwreck discovered off the European continent in international waters. Two principles – *jus gentium* and constructive *in rem* jurisdiction – explain the case's presence here, and a sensitivity to their rationales when mixed with the traditional notion of comity in the exercise of extraterritorial jurisdiction colors the analytical perspective for deciding Spain's motion to dismiss.

Since our nation's founding, federal courts sitting in admiralty, and particularly when adjudicating

[10] I find the evidence as to the *res*'s identity so one-sided that Spain would prevail as a matter of law, which is the standard for granting summary judgment under Rule 56. *Anderson*, 477 U.S. at 250 (Rule 56's standard mirrors that under Rule 50).

salvage claims, have applied the *jus gentium*, or the customary law of the sea, the origins of which date back to the ancients. *See* 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 16-1 (4th ed. 2004). This common heritage of seafaring nations, and by implication, a presumed commonality among nations for resolving such disputes, underpins a federal court's exercise of subject matter jurisdiction irrespective of "the nationality of ships, sailors or seas involved." *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981);[11] *see also R.M.S. Titanic, Inc.*, 171 F.3d at 961 ("The exercise of admiralty subject matter jurisdiction has never been limited to maritime causes arising solely in the United States territorial waters."). A court's consideration of maritime claims arising "from anywhere in the world" is "subject only to a discretionary exercise of the doctrine of *forum non conveniens*." *R.M.S. Titanic, Inc.*, 171 F.3d at 961 (citations omitted); *see also Treasure Salvors*, 640 F.2d at 566 ("[T]he courts of the United States take jurisdiction, subject to some reservations imposed by their own application of the doctrine of forum non conveniens, of suits on maritime claims arising out of transactions and occurrences anywhere in the

[11] The Eleventh Circuit in an *en banc* decision, *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

world." (quoting G. Gilmore and C. Black, *The Law of Admiralty* 51 (2d ed. 1975))).[12]

To invoke *in rem* jurisdiction, the *res* must be *in custodia legis* – in the court's possession. Courts routinely have exercised jurisdiction over vessels and their cargo positioned within the court's jurisdictional boundaries under theories of actual or constructive possession. *R.M.S. Titanic, Inc.*, 171 F.3d at 964. In *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), the Supreme Court implicitly approved a salvor's presentation of a recovered artifact as the fictional equivalent of a wreck discovered in California's territorial waters. *See id.* at 496. The Fourth Circuit in *R.M.S. Titanic, Inc.* applied a constructive possession concept to a historic wreck in international waters. 171 F.3d at 967-968. Indeed, based on this model, I granted Odyssey's motion and authorized the arrest of the *res* at issue. (Doc. 3.)

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[12] One commentator, however, questions the validity of applying this jurisdictional premise (*i.e.*, the *jus gentium*) to historic wrecks. Only a few common law systems have accepted the law of salvage and finds; hence, no "general maritime law" or *jus gentium* exists to support the law of salvage or finds. And more particularly as to historic wrecks, "[t]he advent of major treasure salvage is so recent that there simply is no applicable custom, let alone a *jus gentium*, that addresses the unique phenomenon of underwater cultural heritage in any coherent way." *See* James A.R. Nafziger, *The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck*, 44 Harv. Int'l L.J. 251, 261 (2003).

Yet, this judicially created fiction when applied to a wreck on the high seas complicates a court's exercise of authority. The Fourth Circuit recognized as much:

> In applying these principles to a wreck lying in international waters, obvious complexities emerge. *In rem* jurisdiction, which depends on sovereignty over property, cannot be given effect to property beyond a nation's boundaries of sovereignty. . . . Where both persons and property are beyond a nation's zone of exclusive legal power, its ability to adjudicate rights as to them is limited, but not meaningless.
>
> When nations agree on law to apply on the high seas, they agree to an order even beyond their sovereign boundaries which, while they hope will be honored on the high seas, can only be enforced completely and effectively when the people or property are brought within a nation's zone of power – its sovereignty.
>
> So it must be with the *Titanic*. The *jus gentium*, the law of all maritime nations, is easy to define and declare. But its enforcement must depend on persons or property involved in such a declaration coming into the zone of power of participating nations.

R.M.S. Titanic, Inc., 171 F.3d at 966. *Titanic* cautions a court should wade carefully into international waters to adjudicate a salvage claim, particularly one that concerns a historical wreck with significant loss

of life. This admonition is even more appropriate when the salvor's claim implicates a foreign sovereign's patrimonial interests and that sovereign's asserted independence from suit per the FSIA. Put another way, a court must be sensitive to the principle of international comity when dealing with a dispute involving the exercise of extraterritorial jurisdiction, as the application of international law evokes a sense not only of discretion and courtesy but also of obligation among sovereign states. Restatement (Third) of Foreign Relations Law § 403 cmt. *a* (1987). All this dictates that in the end, the Court's perspective is guided by the principle of reasonableness. *Id.* at § 403 ("[A] state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."); *id.* at § 421 cmt. *a* ("there may be circumstances in which a state has jurisdiction to prescribe but jurisdiction to adjudicate is absent or doubtful"); *see also* 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 16-7 at n. 21 (4th ed. 2004).

2. FSIA

Before the FSIA, courts generally decided foreign sovereign immunity issues based on the recommendations or suggestions of the Executive Branch. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S.

480, 486 (1983).[13] In 1952, with the so-called Tate Letter, the State Department adopted the "restrictive" theory of sovereign immunity, whereby immunity was "confined to suits involving the foreign sovereign's public acts" but not its strictly commercial ones. *Id.* at 486-487. This scheme, however, proved cumbersome, and in 1976 Congress enacted the FSIA, "in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to assure litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process." *Id*. at 488 (citation omitted). Hence, "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 443 (1989); *see also* 28 U.S.C. § 1602 ("Findings and declaration of purpose," stating "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter"). A foreign state, or its property,

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[13] As Spain aptly notes, Chief Justice Marshall applied the doctrine to a case involving another Napoleonic War vessel, and found that the courts of the United States lacked jurisdiction over an armed ship of a foreign state in a United States port. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 146-47 (1812). His rationale still resonates: sovereign immunity "is premised upon the 'perfect equality and absolute independence of sovereigns, and th[e] common interest impelling them to mutual intercourse.'" *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2189-90 (2008) (quoting *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137).

is "presumptively immune from the jurisdiction of United States courts; unless a specified [statutory] exception applies, a federal court lacks subject-matter jurisdiction" over claims against it or its property. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *see also* 28 U.S.C. §§ 1604, 1609.

Given Spain's showing that its property is presumptively immune from suit under the FSIA, Odyssey must show an exception applies. *S & Davis Int'l, Inc. v. The Republic of Yemen*, 218 F.3d 1292, 1300 (11th Cir. 2000). And if Odyssey meets this threshold, Spain ultimately "bears the burden of proving by a preponderance of the evidence that the exception does not apply." *Id*; *see also Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1290 (11th Cir. 1999).[14] Spain clearly meets its obligations with

[14] The Second, Fourth, Fifth, Sixth, and Tenth Circuits set out the same burden-shifting standard but add the foreign sovereign must make a *prima facie* showing that it is a foreign sovereign as defined by the FSIA. *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 80 (2d Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3308 (U.S. Nov. 12, 2008) (No. 08-640); *Gerding v. Republic of France*, 943 F.2d 521, 525-526 (4th Cir. 1991); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *O'Bryan v. Holy See*, 556 F.3d 361, 376 (6th Cir. 2009), *petition for cert. filed* (U.S. May 7, 2009) (No. 08-1384); *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 991-992 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2872 (2008). The Seventh Circuit varies the test slightly. *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 256 (7th Cir. 1983) ("In our opinion Section 1604 requires a foreign state to establish a prima facie case on two elements: that it is a foreign state under the definition employed in FSIA, and that the claim

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Odyssey failing to show any statutory exception applies.[15]

The FSIA, as Spain correctly points out, "grants immunity to a foreign state's property in the United States from attachment, arrest and execution except as provided in specific provisions of the Act." *Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A.*, 210 F.3d 1309, 1311 (11th Cir. 2000) (citing 28 U.S.C. § 1609). Section 1609 of the FSIA states in pertinent part:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and

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relates to a 'public act.' "). *S & Davis Int'l*, in keeping with the other circuits, implicitly requires a sovereign or its property meet the FSIA's definitional demands.

[15] I note the district judge has already determined Spain is immune under the FSIA from Odyssey's *in personam* claims. *See* Order at Doc. 91 (dismissing Count IV ("a claim for a declaration that the shipwrecked vessel and artifacts are beyond the territorial waters of any nation and subject to the law of abandonment, finds, or salvage"), Count V ("a claim in the event of a successful adverse claim of ownership by a third party for equitable relief in the nature of a *quantum meruit* or the like to recover the reasonable and necessary cost of recovery and protection of the vessel and artifacts"), and Count VI ("a claim for damages arising from certain allegedly tortious acts by Spain that allegedly interfered with and burdened the activity of Odyssey and that breach[ed] an alleged duty of Spain to refrain from interference")).

> execution except as provided in sections 1610 and 1611.[16]

Unquestionably, the *Mercedes* is the property of Spain – constructed in 1788 by Navy Engineers in the shipyard of the Spanish Navy in Havana, Cuba; commanded by officers and crewed by sailors of the Royal Spanish Navy throughout its service; and designated as a Spanish frigate of war. (Doc. 131, Ex. A at ¶¶ 7, 9, 12). It remains on the Royal Navy's official registry of ships. (Doc. 131, Ex. A at ¶ 7.) As such, 1609's plain reading limits Odyssey to arguing the Court has jurisdiction under "existing international agreements" or as permitted by 1610 and 1611. None of these exceptions apply here, as Spain urges and Odyssey's silence concedes.[17] Instead, Odyssey sidesteps § 1609's

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[16] No commas punctuate this provision. As one court remarked, the FSIA "is hardly a model of statutory clarity." *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, 923 F.2d 380, 385 (5th Cir. 1991).

[17] Sections 1610(a) and (b) provide exceptions to the immunity of a foreign sovereign's property from "attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State" in specified situations, not to the immunity of a foreign sovereign's property from arrest. 28 U.S.C. § 1610(a), (b). The attachment and execution contemplated by § 1610(a) and (b) is available only after "a reasonable period of time has elapsed following the entry of judgment . . . ." 28 U.S.C. § 1610(c). Section 1610(d) contemplates attachment of property "used for a commercial activity in the United States" prior to the entry of judgment, but expressly provides not only that the foreign state must have "explicitly waived its immunity from attachment prior to judgment," but

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exceptions by claiming: § 1609 does not shield property *outside* the United States; Spain must actually "possess" the *res*; the cargo should be partitioned to satisfy the descendants' claims to the private lots; and other provisions of the FSIA deny Spain sovereign immunity from *in personam* claims. These contentions are without merit as all evade the FSIA's goals, its statutory scheme, and the special status accorded warships per the various treaties and agreements § 1609 necessarily incorporates.

a. the geographical argument

Odyssey parses § 1609's language to argue the provision is inapplicable because the "Defendant site" is not "property *in* the United States." (Doc. 138 at 12.) Indeed, the debris field lies far from our nation's sovereign boundaries. Yet, Odyssey premised its salvage and finds claims on the fiction it created – the depositing of an artifact with the clerk as emblematic

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also that the purpose of the attachment may not be to obtain jurisdiction. 28 U.S.C. §1610(d). The remaining provisions in § 1610 provide exceptions to immunity in cases involving "arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage," 28 U.S.C. § 1610(e); and execution and attachment in aid of execution where a judgment has been rendered against a foreign sovereign on a claim involving terrorism, 28 U.S.C. § 1610(f)(1)(A), (g). Thus, Section 1610(e), which plainly is not applicable in this case, is the only provision providing an exception to the immunity of a foreign sovereign's property from arrest *in rem*. Section 1611 provides exceptions to the Section 1610 exceptions. In short, none of these exceptions apply here.

of the Court's possession of the *entire* shipwreck (*in custodia legis*). And it sought by this *in rem* action to have the Court "adjudicate rights in specific property before the court" and to obtain a judgment that "operate[s] against anyone in the world claiming against *that* property." *R.M.S. Titanic, Inc.*, 171 F.3d at 957 (emphasis in original). Given this, Odyssey cannot avoid the FSIA's reach by arguing the property it caused to be arrested and deposited before the Court is not within the United States. Besides, accepting Odyssey's "geographical" distinction would create an unacceptable consequence. Under Odyssey's logic, the FSIA would apply to the specie and artifacts Odyssey recovered and transported to the United States because that property is now Spain's property *in* the United States; yet, the Act would not cover Spain's property at the wreck's site. This geographical bifurcation would immunize Spain from suit over its recovered property warehoused in the United States but force it to litigate in our courts its rights to its property situated well beyond our national boundaries. Such a result would gut the very purpose of sovereign immunity: "The doctrine [of foreign sovereign immunity] is one of implied consent by the territorial sovereign to exempt the foreign sovereign from its 'exclusive and absolute' jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign." *National City Bank of New York v. Republic of China*, 348 U.S. 356, 362 (1955) (footnote and citation omitted); *see also Pimentel*, 128 S. Ct. at 2190 ("Giving full

effect to sovereign immunity promotes the comity interests that have contributed to the development of the immunity doctrine.").

b. the possession argument

Odyssey next maintains that Spain is not entitled to immunity because it did not have actual possession of the *res* at the time of arrest (presumably in the physical sense – a remarkable feat given the depths of the wreck and the size of the debris field). (Doc. 138 at 15.) To support this theory, Odyssey seizes upon the Supreme Court's language in *California v. Deep Sea Research, Inc.*, 523 U.S. at 506-508, in which the Court held California did not have Eleventh Amendment immunity where it did not have "actual possession" of the *res* in an *in rem* admiralty case. That case, which did not involve the FSIA but rather the Eleventh Amendment and the Abandoned Shipwreck Act, has no application here, particularly when the Supreme Court has repeatedly stated the FSIA "'provides the sole basis for obtaining jurisdiction over a foreign state.'" *Nelson*, 507 U.S. at 355 (quoting *Amerada Hess Shipping Corp.*, 488 U.S. at 443).

When evaluating jurisdiction, the Court "start[s] from the settled proposition that the subject-matter jurisdiction of the lower federal courts is determined by Congress 'in the exact degrees and character which to Congress may seem proper for the public good.'" *Amerada Hess Shipping Corp.*, 488 U.S. at

433 (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)). "Claims of foreign states to immunity should [ ] be decided by courts . . . in conformity with the principles set forth in [the FSIA]." 28 U.S.C. § 1602. When Congress enacted the FSIA, it did not include an actual possession requirement in the language of the statute. Rather, it simply stated that "the property in the United States *of a foreign state* shall be immune . . . ." 28 U.S.C. § 1609 (emphasis added). No section of the FSIA imposes the possessory requirement Odyssey advances, and I refuse to read one into the statute. *See Calzadilla v. Banco Latino Internacional*, 413 F.3d 1285, 1287 (11th Cir. 2005) ("The starting point in statutory construction is the language of the statute, and if that is plain, then the sole function of the court is to enforce the statute according to its terms.") Indeed, Odyssey's possession requirement would mean that a foreign state would always be required to litigate salvage claims against any of its sunken flagged vessels, even its warships.

c. the cargo argument

In 1824, having failed to win post-war reparations from Britain for the *Mercedes*, Spain offered to compensate those who suffered losses. (Doc. 163, Ex. C at 2-3.) From this, Odyssey deduces that Spain has necessarily conceded that not all the cargo aboard the *Mercedes* was sovereign property. And immunizing the entire cargo, so Odyssey further reasons, would deny its rightful owners (namely, the claimants other than Spain) of their property. Accordingly, the Court

should split the cargo from the vessel and then, to vindicate the individual claimants, split the cargo into separate, private lots. (Doc. 179 at 8-9.) In support of this proposition, Odyssey cites an unreported district court decision where the court refused to accord immunity to the plaintiff's claims under the FSIA as to cargo on a foreign-state owned vessel because the "claimants . . . failed to provide any authority for the proposition that property not belonging to a foreign state but carried aboard a vessel belonging to a foreign state is immune from seizure." *Borgships, Inc., Monrovia v. M/V Macarena*, Nos. 92-3119 & 93-622, 1993 WL 408342 at *3 (E.D. La. 1993) (citing 28 U.S.C. § 1609). That case, which involved a claim for salvage services to a cargo vessel, is simply inapplicable here, and Odyssey's cargo argument fails for a variety of reasons.

First, to the extent *Borgships* has any relevance, it weighs against Odyssey as the Court dismissed the plaintiff's *in rem* action on grounds that § 1609 prohibits attachment or arrest of a sovereign's property to acquire jurisdiction (*id.* at *2-3), the position that Spain argues and Odyssey avoids. Indeed, the House Report underscores Congress's deliberate preference for *in personam* jurisdiction over *in rem* jurisdiction. "Here it should be pointed out that neither section 1610 nor 1611 would permit an attachment for the purpose of obtaining jurisdiction over a foreign state or its property. For this reason, section 1609 has the effect of precluding attachments as a means for commencing a lawsuit." H.R. Rep. 94-1487 at 26 (1976),

as reprinted in 1976 U.S.C.C.A.N. 6604, 6625. Such attachments "give rise to serious friction in United States' foreign relations." *Id.* at 27, *as reprinted in* 1976 U.S.C.C.A.N. at 6626. Accordingly, the Act, through its long-arm provisions, confers personal jurisdiction over a foreign state as to every claim for which the foreign state is not entitled to immunity. *Id.*; *see also: In Re B-727 Aircraft Serial No. 21010*, 272 F.3d 264, 270 (5th Cir. 2001) (the FSIA's related grant of jurisdiction at 28 U.S.C. § 1330 confers jurisdiction only over any claim for relief *in personam* against a foreign state as opposed to *in rem*); 14A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3662 (3d ed. 1998).

The adjudication of the rights of the private claimants would also necessarily implicate Spain's rights to the property. Such an exercise would frustrate the FSIA's goals and impermissibly prejudice Spain. In *Republic of Philippines v. Pimentel*, the Supreme Court applied sovereign immunity principles to an interpleader action involving property allegedly stolen by former President Ferdinand Marcos of the Philippines. 128 S. Ct. at 2184. Although the two sovereign entities, the Republic of the Philippines and the Philippine Presidential Commission on Good Governance, had been dismissed on the basis of foreign sovereign immunity, the district court proceeded to judgment over their objections. *Id.* Reasoning that neither sovereign entity would prevail on its claim to the funds, the Ninth Circuit affirmed. *Id.* The Supreme Court reversed and dismissed the case under

Fed. R. Civ. P. 19(b), concluding the district and appellate courts gave insufficient consideration to the likely prejudice the Republic and the Commission would have suffered if the interpleader had proceeded in their absence. *Id.* at 2192. "[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Id.* at 2191. The Court also recognized that "[d]ismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of foreign sovereign immunity." *Id.* at 2194. In many respects, Odyssey's *in rem* action approximates an interpleader. Odyssey constructively deposited the *res* with the Court asking for an adjudication of its rights and those of any potential claimants to the property. Hence, *Pimentel*'s reasoning is instructive. Dividing the *Mercedes*'s cargo, either geographically or by ownership rights (private versus government owned) as Odyssey proposes, contradicts *Pimentel*'s teaching by prejudicing Spain's sovereign interests and countering principles of comity. *See* Restatement (Third) of Foreign Relations Law § 421 (1987), *supra.*

Odyssey's cargo versus vessel approach also departs from traditional admiralty precepts and subverts the plain reading of § 1609. A vessel and its cargo are inextricably intertwined. *See* Sunken Military Craft Act, *infra*, at note 20 (sunken military craft

includes its cargo); *See R.M.S. Titanic, Inc.*, 171 F.3d at 964 ("The propriety of exercising *in rem* jurisdiction over an entire ship wreck within the court's territorial jurisdiction when only part of that wreck is actually presented to a court rests upon the fiction that the *res* is not divided and that therefore possession of some of it is constructively possession of all." (citation omitted)). This is particularly so here as warships have always been accorded a special status, a notion that dates back to *The Schooner Exchange*, *supra*. *See also Guevara v. Republic of Peru*, 468 F.3d 1289, 1296 (11th Cir. 2006) (noting the distinction carved out in early Supreme Court cases dealing with the immunities granted to armed ships as opposed [sic] private trading vessels).

The *Mercedes*'s warship status is one that § 1609 necessarily recognizes because the provision requires this Court evaluate Spain's claim of immunity "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of [the FSIA]." 28 U.S.C. § 1609; *see also 767 Third Ave. Assocs. v. Permanent Mission of Republic of Zaire to United Nations*, 988 F.2d 295, 297 (2d Cir. 1993) ("Because of this provision the diplomatic and consular immunities of foreign states recognized under various treaties remain unaltered by the Act."); *Moore v. United Kingdom*, 384 F.3d 1079, 1084-85 (9th Cir. 2004) (international agreements existing at the time of enactment of the FSIA may expand or limit a foreign sovereign's exposure to suit). As Spain emphasizes, and as the Fourth Circuit has specifically

held, Spain's sovereign vessels are covered by the 1902 Treaty of Friendship and General Relations between the United States and Spain. *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 638, 642-643 (4th Cir. 2000). Per its provisions, "[i]n cases of shipwreck . . . each party shall afford to the vessels of the other, whether belonging to the State or to individuals, the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases." Treaty of Friendship and General Relations, U.S.-Spain, Art. X, July 3, 1902, 33 Stat. 2105;[18] *see also Sea Hunt, Inc.*, 221 F.3d at 642. In short, this treaty is "unique" and "requires that imperiled Spanish vessels shall receive the same immunities conferred upon similarly situated vessels of the United States." *Sea Hunt*, 221 F.3d at 642.[19]

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[18] Odyssey argues contemporaneous diplomatic communications between the United States and Spain suggest that Article X is limited to our nation's territorial waters and would not cover wrecks in international waters. (Doc. 138 at 19 & n. 9) As set out in part D.2.a., *supra*, Odyssey has brought the *res* within [sic] Court's jurisdiction and, therefore, within the coverage of the Treaty. Odyssey's other arguments as to the Treaty's application are likewise without merit (*i.e.*, the Treaty applies only to vessels and there is not a vessel here; the treaty does not protect vessels on a commercial mission).

[19] *Sea Hunt* involved two Spanish frigates of the same era as the *Mercedes*, *La Galga* and the *Juno*, both lost off the Virginia coast in 1750 and 1802, respectively. Like here, a commercial salvor filed an *in rem* action to perfect its salvage rights, and Spain filed a verified claim of ownership. The Fourth Circuit upheld Spain's claims finding that under the treaty,

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The United States protects its sunken warships. *See* Geneva Convention on the High Seas, Art. 8, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200 ("Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State"); Sunken Military Craft Act, Pub. L. No. 108-375, § 1406, 118 Stat. 2094 (codified at 10 U.S.C. § 113 note) (October 28, 2004) ("The law of finds shall not apply to . . . any foreign sunken military craft located in United States waters"; and "[n]o salvage rights or awards shall be granted with respect to . . . any foreign sunken military craft located in United States waters without the express permission of the relevant foreign state.");[20] Protection of Sunken Warships, Military Aircraft and Other Sunken Government Property, 69 F.R. 5647-01, 5648 (Feb. 5, 2004) (President Clinton's January 19, 2001, statement expressing concern that recent technological advances made the unauthorized disturbance of sunken State craft possible and stating the United States "recognizes that title to a United States or foreign sunken State craft, wherever located, is not extinguished by passage of time, regardless of when such sunken

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"Spanish vessels, like those belonging to the United States, may only be abandoned by express acts." *Sea Hunt*, 221 F.3d at 638.

[20] The Act defines a "sunken military craft" to include "associated contents," which means "(A) the equipment, cargo, and contents of a sunken military craft that are within its debris field; and (B) the remains and personal effects of the crew and passengers of a sunken military craft that are within its debris field." *Id.* at § 1408(1), (3).

State craft was lost at sea;" sunken warships "may contain objects of a sensitive . . . archaeological or historical nature.");[21] *see also International Aircraft Recovery, L.L.C. v. The Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255, 1258-60 (11th Cir. 2000) (determining law of salvage and not law of finds applied to navy bomber that crashed in international waters where the United States had not abandoned its interests in ships sunk over a century ago); *Sea Hunt*, 221 F.3d at 647 (noting the United States' interest is "rooted in customary international law;" the "[p]rotection of the sacred sites of other nations thus assists in preventing the disturbance and exploitation of our own."); *United States v. Steinmetz*, 763 F. Supp. 1293, 1299 (D.N.J. 1991) (reciting the State Department's position that warships and their remains are "clothed with sovereign immunity and therefore entitled to a presumption against abandonment of title"), *aff'd*, 973 F.2d 212 (3d Cir. 1992).

d. other FSIA arguments

Unable to penetrate § 1609's exceptions, Odyssey seeks refuge in another FSIA provision, § 1605, which deals with suits in admiralty to enforce a maritime lien based on the commercial activity of a foreign

[21] Although the Sunken Military Craft Act and President Clinton's statement postdate enactment of the FSIA, the 1902 Treaty of Friendship and General Relations effectively incorporates their policies by requiring mutual protection.

state. 28 U.S.C. § 1605(b).[22] That section does not apply here for obvious reasons. Section 1609's language plainly precludes the inclusion of § 1605's exceptions. Indeed, Odyssey essentially advances an exception to § 1609 that Congress purposely omitted. *Mangattu v. M/V Ibn Hayyan*, 35 F.3d 205, 209 (5th Cir. 1994) ("The plain words of the statute [§ 1609] clearly preclude reading the language of §§ 1605 and 1606 to control the issue in the case."). Moreover, Odyssey's invocation of § 1605(b) counters the procedural history in this case. Congress, in enacting § 1605(b), opted for an *in personam* suit in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state as opposed to an *in rem* action for a specific reason – to avoid the friction in the nation's

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[22] Section 1605(b) and (c), which set out exceptions to § 1604 immunity, provide in relevant part:

> (b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state . . . .
>
> (c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained . . . .

Notably, salvage gives rise to a lien, but a find of maritime property does not. 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 16-7 (4th ed. 2004).

foreign relations caused by attachments or arrests of a foreign sovereign's property to acquire jurisdiction. *Amerada Hess Shipping Corp.*, 488 U.S. at 438; *see also* H.R. Rep. 94-1487 at 27, *as reprinted in* 1976 U.S.C.C.A.N. at 6626 (attachments "give rise to serious friction in United States' foreign relations."). In short, the Act contemplates an attachment or arrest to enforce a judgment, not an arrest to gain jurisdiction as Odyssey achieved. *See Mangattu*, 35 F.3d at 209. And irrespective of all this, the *Mercedes* clearly was not engaged in any commercial activity at the time of its demise, despite Odyssey's contentions otherwise, as § 1605 would require. *See* 28 U.S.C. § 1603(d); *see also Saudi Arabia v. Nelson*, 507 U.S. at 360 (for FSIA purposes, a foreign government engages in commercial activity where it exercises "only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns") (quotations omitted); *Guevara v. Republic of Peru*, 468 F.3d at 1298 (a foreign state is commercially engaged if it acts like an ordinary private person and not like a sovereign (citation omitted)). In sum, Spain's property is immune from arrest, and this Court is without subject matter jurisdiction to adjudicate Odyssey's claims and those of the private claimants (the purported descendants of those who perished) against the *res.* 28 U.S.C. § 1609.

3. The Republic of Peru

When the *Mercedes* departed El Callao in 1804, the Viceroyalty of Peru covered present day Peru and

Chile. But at its zenith, it included all of Spain's colonial empire in South America except for Venezuela. That dominance waned over time with the creation of the Viceroyalty of New Grenada (Colombia, Ecuador, Panama, and Venezuela) in 1739 and the Viceroyalty of Rio de la Plata (Argentina, Uruguay, Paraguay, and Bolivia) in 1776. As a consequence of the independence movements of the early 19th century, these viceroyalties disintegrated. Peru declared its independence and sovereign status on July 28, 1821.[23] In 1824, General de Sucre leading the United Liberator Army of Peru defeated a much larger Spanish force at the Battle of Ayacucho. In the subsequent Capitulation of Ayacucho (December 9, 1824), Spain surrendered its territory and its objects within that territory. (Doc. 161, Ex. A at ¶ 8.) Eventually, Spain formally recognized Peru's independence in 1879 with execution of a peace and friendship treaty. (Doc. 161, Ex. A at ¶ 11.) Notably, that treaty provided from the date of its ratification, "there will be a complete forgetting of the past and a solid and inviolable peace between the Republic of Peru and His Majesty the King of Spain." (Doc. 161, Ex. A at ¶ 11; "Peru, Viceroyalty of." *Encyclopædia Britannica* . 2009. Encyclopædia Britannica Online. 14 May 2009 < http://search.eb.com/eb/article-9059373>.).

[23] The United States recognized Peru's independent status in 1822.

Against this historical backdrop, Peru argues Spain's rights must be measured against its patrimonial interests. But its reasoning is inconsistent. On one hand, Peru agrees that Spain is immune from Odyssey's salvage claim (indeed, it asserts it too is immune from Odyssey's claim); but on the other, it maintains Spain is not immune from Peru's claim against the *res*. And as a successor state, Peru contends its right to the specie (all or part) is superior to Spain's since the "property physically, culturally and historically originat[ed] in Peru." (Doc. 206, Ex. A at ¶ 25.) Peru arrives at this conclusion based upon "the law of the sea, the law of state succession, and considerations of equity and international policy concerning condemnation of colonialism, protection of permanent sovereignty over national wealth and resources, the protection of cultural heritage and the prohibition against pillage of occupied countries." (Doc. 206, Ex. A at ¶ 28.) Put more succinctly, Peru's argument is an equitable one grounded on claims of exploitation by its former colonial ruler.[24] Spain not only opposes Peru's legal bases, but it also opposes

[24] Peru, without factual attribution, assumes that all the specie minted in Lima came from ore mined within the boundaries of present day Peru. Given the early date of some of the coins Odyssey recovered, it is reasonable to conclude that these could have been struck from ore mined in Upper Peru (later part of the Viceroyalty of Rio de la Plata). *See* John Fisher, *Silver Production in the Viceroyalty of Peru, 1776-1824*, The Hispanic American Historical Review, Vol. 55, No. 1 (Feb. 1975), http://www.jstor.org/stable/2512735.

with justification this Court's authority to adjudicate Spain's and Peru's competing claims.

Peru overlooks this Court's tenuous jurisdictional grip over the *res*. This is not the typical *in rem* action involving a maritime lien on a cargo vessel docked at a port within the district. Here, the *res* lacks any nexus to our nation's sovereign boundaries. Instead of the usual jurisdictional ties, *in rem* jurisdiction has precariously rested on the concepts of *jus gentium* and constructive possession of the wreck, the bases for the Court's initial exercise of authority upon Odyssey's verified complaint. In some practical sense, this jurisdictional grant has been an inchoate one. *See R.M.S. Titanic*, 286 F.3d at 196 ("Acting under principles of salvage law and consistent with the inchoate lien that RMST obtained as salvor, the district court exercised *in rem* jurisdiction and issued a warrant [of arrest]"). The success of Odyssey's lien against Spain's claim of sovereign immunity, not to mention the fate of any claims against the *res*, has always hinged on the wreck's identity or its lack of any discernable identity. With the *Mercedes*'s identity confirmed and her status cloaked with her sovereign's immunity, her jurisdictional mooring line to this district has been severed. *In rem* jurisdiction no longer exists. *L.B. Harvey Marine, Inc. v. M/V River Arc*, 712 F.2d 458, 459 (11th Cir. 1983) ("where the res is no longer before the court, its in rem jurisdiction is destroyed" (citation omitted)); *Taylor v. Tracor Marine, Inc.*, 683 F.2d 1361, 1362 (11th Cir. 1982) (same).

But even if the Court were to accept Peru's jurisdictional presupposition – that Spain's immunity did not divest the Court of jurisdiction to resolve Peru's claim to part of the *res* (the specie) – several reasons warrant the dismissal of Peru's claim.[25] In the main, Peru points to Article 149 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), a provision that promotes the preservation and disposition of "[a]ll objects of an archaeological and historical nature found in the Area . . . for the benefit of mankind as a whole [with] particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin." United Nations Convention on the Law of the Sea, art. 149, Dec. 10, 1982, 21 I.L.M. 1245. Peru makes this argument even though it concedes it has neither signed nor ratified UNCLOS and the *Mercedes* is not within the "Area." *See id.* at Article 1 (defining the "Area" as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction."). Regardless, because the Senate has not yet ratified UNCLOS, Article 149 would have relevancy only to the extent the article reflects customary international law. *United States v. Jho*, 534 F.3d 398, 406 n.6 (5th Cir. 2008) ("[S]ources are

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[25] I note that the Court's exercise of equitable power (or its refusal to do same) is reviewed for an abuse of discretion. *Dresdner Bank AG v. M/V Olympia Voyager*, 465 F.3d 1267, 1273 (11th Cir. 2006).

unclear as to which provisions of UNCLOS constitute customary international law."). The Restatement defines customary international law as that which "results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of Foreign Relations Law § 102. As one leading treatise remarks, "[i]nternational law is sparse concerning jurisdiction over shipwrecks." 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 16-7 (4th ed. 2004). For disputes between competing sovereigns over underwater cultural heritage discovered in international waters, there is no customary international law. *See generally* James A.R. Nafziger, *The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck*, 44 Harv. Int'l L.J. 251, 261 (2003). And no court has ventured into waters far beyond its jurisdictional boundaries to resolve a dispute between two sovereigns over the remnants of one of the sovereign's sunken warships. Considering that no court has applied Article 149, Peru's argument is not persuasive.[26]

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[26] Peru's invocation of Article 149 infers, at least to some degree, that Spain would not preserve the specie for "the benefit of mankind as a whole." Such a notion counters Spain's quick legal efforts to defeat Odyssey's claims against the *res*. Regardless, Spain vigorously argues it, not Peru, is the "country of origin" whose historical interests are to be protected under Article 149. Further, Peru's effort to separate the specie from the vessel is like Odyssey's failed arguments to separate the cargo into lots or geographical zones. All this makes any determination of the claims by this Court an unreasonable exercise of its jurisdiction. *See* Restatement (Third) of Foreign Relations Law § 421 (1987)

(Continued on following page)

Peru and Spain's dispute is intertwined with centuries of mutual history. Addressing their differences in this forum, as Peru argues equity dictates, would undermine the traditional notions of international comity as applied from *The Schooner Exchange* through *Pimentel*. Indeed, it is not surprising that our national courts have been reluctant to adjudicate claims between sovereigns unless the commercial exceptions to the FSIA apply. *See* Restatement (Third) of Foreign Relations Law § 451 cmt. *e* (1987) ("National courts have not normally adjudicated claims of one state against another, but where instrumentalities of two states have commercial relations with each other, there is no reason why controversies arising out of such relations could not be submitted to national courts"); *see*, *e.g.*, *Honduras Aircraft Registry, Ltd. v. Government of Honduras*, 129 F.3d 543, 549-50 (11th Cir. 1997) (FSIA commercial exception applied to suit by Honduran corporation and Bahamian corporation against Honduran government, but case remanded for consideration of "act of state" doctrine).

Lastly, whether viewed from the perspective of an exploited colony or of a sovereign power using its resources, their dispute implicates the act of state doctrine, as Spain asserts.[27] Unlike the FSIA, the act

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(listing factors for determining if a state's exercise of jurisdiction over a thing is reasonable).

[27] "As a rule, when a foreign nation confiscates the property of its own nationals, it does not implicate principles of international

(Continued on following page)

of state doctrine does not divest a court of jurisdiction. Rather, it "provides foreign states with a substantive defense on the merits." *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004). In its traditional formulation, it "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); *see also Altmann*, 541 U.S. at 700 ("Under that doctrine, the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts."); *Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1253 (11th Cir. 2006) ("The doctrine prevents any court in the United States from declaring that an official act of a foreign sovereign performed within its own territory is invalid.") (citing *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 405-06 (1990)). In sum, Spain and Peru's dispute over the specie is best resolved through direct negotiations between the two and not in this forum. Restatement (Third) of Foreign Relations Law § 902 cmt. *d* (1987).

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law." *Fogade v. ENB Revocable Trust*, 263 F.3d 1274, 1294 (11th Cir. 2001) (citations omitted).

E. Conclusion

More than two hundred years have passed since the *Mercedes* exploded. Her place of rest and all those who perished with her that fateful day remained undisturbed for the centuries – until recently. International law recognizes the solemnity of their memorial, and Spain's sovereign interests in preserving it. *Sea Hunt*, 221 F.3d at 647. This Court's adherence to those principles promotes reciprocal respect for our nation's dead at sea. *Id.* It is this comity of interests and mutual respect among nations, whether expressed as the *jus gentium* (an impetus to exercise judicial authority) or as sovereign immunity (an impetus for refraining from the exercise of judicial authority), that warrants granting Spain's motions to vacate the *Mercedes*'s arrest and to dismiss Odyssey's amended complaint. Accordingly, it is

RECOMMENDED:

1. Spain's motion to dismiss (Doc. 131) and motion to vacate the arrest warrant (Doc. 132) be granted.

2. Odyssey's amended complaint (Doc. 25) be dismissed and the warrant of arrest (Doc. 5) be vacated.

3. All claims against the *res* be denied without prejudice.

4. Odyssey, as the substitute custodian, be directed to return the *res* to Spain within ten days or as mutually agreed.

IT IS SO REPORTED at Tampa, Florida on June 3, 2009.

/s/ Mark A. Pizzo
MARK A. PIZZO
UNITED STATES
MAGISTRATE JUDGE

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. 28 U.S.C. § 636(b)(1).

cc: Hon. Steven D. Merryday
Counsel of Record
Pro Se Claimants

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff,

-vs-

Case No. 8:07-cv-614-T-24MAP

THE UNIDENTIFIED, SHIPWRECKED VESSEL, its apparel, tackle, appurtenances and cargo located within center point coordinates; In Rem,

Defendant. /

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment of dismissal for lack of subject matter jurisdiction is hereby entered as to the amended complaint (Doc. 25) and as to each claim to the res (Docs. 13, 120, 136, 157, 164, 168, 169, 175, and 176).

Date: December 28, 2009

SHERYL L. LOESCH, CLERK

By: /s/ Ariel Guzman
Ariel Guzman, Deputy Clerk

Copies furnished to:

Counsel of Record
Unrepresented Parties

CIVIL APPEALS JURISDICTION CHECKLIST

1. ***Appealable Orders***: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

   (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291**: Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Pitney Bowes, Inc. V. Mestre*, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).

   (b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final,

appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), *Williams v. Bishop*, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 837 (11th Cir. 1998).

(c) **Appeals pursuant to 28 U.S.C. Section 1292(a)**: Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions. . ." and from "[i]nterlocutory decrees. . .determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

(d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

(e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including,

but not limited to: *Cohen V. Beneficial Indus. Loan Corp.*, 337 U.S. 541,546,69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); *Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc.*, 890 F. 2d 371, 376 (11th Cir. 1989); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. ***Time for Filing***: The timely filing of a notice of appeal is mandatory and jurisdictional. *Rinaldo v. Corbett*, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:

   (a) **Fed.R.App.P. 4(a)(1)**: A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD – no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

   (b) **Fed.R.App.P. 4(a)(3)**: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or

within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

(c) **Fed.R.App.P.4(a)(4)**: If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

(d) **Fed.R.App.P.4(a)(5) and 4(a)(6)**: Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

(e) **Fed.R.App.P.4(c)**: If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date

of deposit and state that first-class postage has been prepaid.

3. ***Format of the notice of appeal***: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. *See also* Fed.R.App.P. 3(c). A *pro se* notice of appeal must be signed by the appellant

4. ***Effect of a notice of appeal***: A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

Rev.: 4/04

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 10-10269

ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff-Appellant,

versus

THE UNIDENTIFIED SHIPWRECKED VESSEL,
its apparel, tackle, appurtenances and cargo located
within center point coordinates, In Rem.

Defendant,

KINGDOM OF SPAIN,

Claimant-Appellee,

REPUBLIC OF PERU,
GONZALO DE ALIAGA,
the Count of San Juan de Lurigancho,
AGUSTIN DE ALIAGA,
the current Marques de Zalada del Fuente,
GONZALO ALVAREZ DEL VILLAR, et al.,

Claimants.

No. 10-10317

ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff,

versus

THE UNIDENTIFIED SHIPWRECKED VESSEL,
its apparel, tackle, appurtenances and cargo located
within center point coordinates, In Rem,

Defendant,

GONZALO DE ALIAGA,
the Count of San Juan de Lurigancho,
AGUSTIN DE ALIAGA,
the current Marques de Zelada del Fuente,
GONZALO ALVAREZ DEL VILLAR,
IGNACIO DE COLMENARES,
the 11th Count of Polentinos,
ALBERTO EMILIO THIESSEN,
ENRIQUETA PITA DUTHURBURU,
FLORA LEONOR PERALES CALDERON
DE COLMENARES,
FELIPE VOYEST,
ADELA ARMIDA DE IZCUE BAZO,
CAROLA DAIREAUX KINSKY,
ELEONORA DAIREAUX KINSKY,
MATILDE DAIREAUX KINSKY,
JULIO VEGA EURASQUIN,
INEZ MARQUEZ OSORIO,
JAVIER DE GOYENECHE,
the current Count of Guaqui and
Marques de Villafuente,
JUAN MARIANO DE GOYENECHE
Y SIL VELA,
the current Marques of Casa Davila,

Claimants-Appellants,

KINGDOM OF SPAIN,

Claimant-Appellee.

No. 10-10318

ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff,

versus

THE UNIDENTIFIED SHIPWRECKED VESSEL, its apparel, tackle, appurtenances and cargo located within center point coordinates, In Rem,

Defendant,

ELSA DORCA WHITLOCK, f.k.a. Elsa Dorca Ruiz,

Claimant-Appellant,

KINGDOM OF SPAIN,

Claimant-Appellee.

No. 10-10319

ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff,

versus

THE UNIDENTIFIED SHIPWRECKED VESSEL, its apparel, tackle, appurtenances and cargo located within center point coordinates, In Rem,

Defendant,

REPUBLIC OF PERU,

Claimant-Appellant,

KINGDOM OF SPAIN,

Claimant-Appellee.

No. 10-10320

ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff,

versus

THE UNIDENTIFIED SHIPWRECKED VESSEL, its apparel, tackle, appurtenances and cargo located within center point coordinates, In Rem,

Defendant,

SANTIAGO DE ALVEAR,
EMILIO DE ALVEAR,
MARIA EUGENIA SOLVEYRA,
ALEJANDRO JULIAN PERA BARTHE',
AGUSTINA SOLVEYRA,
IGNACIO SOLVEYRA,

Claimants-Appellants,

KINGDOM OF SPAIN,

Claimant-Appellee.

No. 10-10374

ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff,

versus

THE UNIDENTIFIED SHIPWRECKED VESSEL, its apparel, tackle, appurtenances and cargo located within center point coordinates, In Rem,

Defendant,

DR. JAIME DURAND PALACIOS,

Claimant-Appellant,

KINGDOM OF SPAIN,

Claimant-Appellee.

No. 10-10375

ODYSSEY MARINE EXPLORATION, INC.,

Plaintiff,

versus

THE UNIDENTIFIED SHIPWRECKED VESSEL, its apparel, tackle, appurtenances and cargo located within center point coordinates, In Rem,

Defendant,

JOSE ANTONIO RODRIGUEZ-MENENDEZ, a.k.a. Joseph Anthony Rodriguez,

Claimant-Appellant,

KINGDOM OF SPAIN,

Claimant-Appellee.

Appeals from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Nov. 29, 2011)

Before: HULL, BLACK and STAPLETON,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en Banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan Black
UNITED STATES
CIRCUIT JUDGE

* Honorable Walter K. Stapleton, United States Circuit Judge for the Third Circuit, sitting by designation.

28 U.S.C.A. § 1602

§ 1602. Findings and declaration of purpose

Currentness

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

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28 U.S.C.A. § 1603

§ 1603. Definitions

Effective: February 18, 2005

Currentness

For purposes of this chapter–

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity–

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C.A. § 1604

§ 1604. Immunity of a foreign state from jurisdiction

Currentness

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

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28 U.S.C.A. § 1605

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

Effective: January 28, 2008

Currentness

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case–

> **(1)** in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> **(2)** in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in

connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to–

> **(A)** any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub.L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a

commercial activity of the foreign state: *Provided*, That–

> **(1)** notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and
>
> **(2)** notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if

the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341

(g) Limitation on discovery.–

(1) In general.– (A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery

on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.– (A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would–

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign

and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.– The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.– A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.– Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

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28 U.S.C.A. § 1605A

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

Effective: January 28, 2008
Currentness

(a) In general.–

(1) No immunity.– A foreign state shall not be immune from the jurisdiction of courts of the

United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) Claim heard.– The court shall hear a claim under this section if–

> **(A)(i)(I)** the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or
>
> **(II)** in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing,

and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred–

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) Limitations.– An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations

Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of–

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) Private right of action.– A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to–

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a) (1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be

vicariously liable for the acts of its officials, employees, or agents.

(d) Additional damages.– After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) Special masters.–

(1) In general.– The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) Transfer of funds.– The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) Appeal.– In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) Property disposition.–

(1) In general.– In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is–

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) Notice.– A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) Enforceability.– Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) Definitions.– For purposes of this section–

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

28 U.S.C.A. § 1606

§ 1606. Extent of liability

Effective: November 26, 2002
Currentness

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

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28 U.S.C.A. § 1607

§ 1607. Counterclaims

Effective: January 28, 2008
Currentness

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim–

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

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28 U.S.C.A. § 1608

§ 1608. Service; time to answer; default

Currentness

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of

the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services–and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state–

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made–

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

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28 U.S.C.A. § 1609

§ 1609. Immunity from attachment and execution of property of a foreign state

Currentness

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

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28 U.S.C.A. § 1610

§ 1610. Exceptions to the immunity from attachment or execution

Effective: January 28, 2008
Currentness

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if–

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property–

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A, regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if–

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution

or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5), 1605(b), or 1605A of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if–

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural

person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries–

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver.– The President may waive any provision of paragraph (1) in the interest of national security.

(g) Property in certain actions.–

(1) In general.– Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such

a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of–

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable.– Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders.– Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

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28 U.S.C.A. § 1611

§ 1611. Certain types of property immune from execution

Effective: August 1, 1996
Currentness

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if–

> **(1)** the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent

foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Docket No. 10-10269J*

Odyssey Marine Exploration, Inc.
Plaintiff-Appellant

v.

The Kingdom of Spain
Claimant-Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
The Hon. Steven D. Merryday, Presiding

APPELLANT'S AMENDED OPENING BRIEF
(amended as to record citations only)

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* *Related cases:* This appeal is the lead case and is related to the following docketed appeals: 10-10317, 10-10318, 10-10319, 10-10320, 10-10374, 10-10375.

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* * *

ARGUMENT

I. SPAIN'S CLAIM OF SOVEREIGN IMMUNITY MUST FAIL BECAUSE SPAIN WAS NOT IN POSSESSION OF THE *RES*.

Without the benefit of this Court's clear guidance in *Aqua Log Inc. vs. State of Georgia,* 594 F.3d 1330 (11th Cir. 2010), the district court erroneously held that the fact that Spain was not in possession of the *res* at the time of its arrest by Odyssey was irrelevant. Doc.270:24-26. The district court declared, "no section of the FSIA imposes the possessory requirement Odyssey advances, and I refuse to read one into the statute." Doc.209 at 20. This ruling was wrong and has since been shown as such by this Court's holding in *Aqua Log*. In *Aqua Log* (which the Eleventh Circuit decided a month after the district court's erroneous dismissal of the subject case), this Court held that even absent specific statutory language, possession is indeed required in order for a sovereign to claim immunity in an *in rem* admiralty action where its purported property is the *res* at issue.

Although in *Aqua Log* this Court considered the possession requirement for the applicability of the

sovereign immunity of a state (Georgia) under the Eleventh Amendment rather than a foreign country under the Foreign Sovereign Immunities Act, the Court's well-reasoned analysis was based in part upon case law which addressed the sovereign immunity of foreign sovereigns generally, including Spain. In fact, this Court relied upon many of the same cases which Odyssey cited in its pleadings below, but which were dismissed by the district court as being irrelevant.[8] Although the cases discussed predated the FSIA, this Court held that the actual possession doctrine for sovereign immunity in *in rem* admiralty cases is pervasive. Moreover, the FSIA must be considered against the backdrop of general sovereign immunity principles, and there is certainly no indication that Congress intended the FSIA to provide greater protection to a foreign sovereign lacking possession than the Constitution or U.S. law affords to a domestic sovereign lacking possession. In each situation, the absence of actual possession – and therefore the absence of any corresponding *dispossession* – significantly diminishes any likelihood that a sovereign's interests would be offended by the mere exercise of the Court's jurisdiction when the *res* is brought before the court for appropriate disposition.

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[8] These cases include *California v. Deep Sea Research, Inc., 523 U.S. 491 (1998); The DAVIS, 77 U.S. 15 (1869); The SCHOONER EXCHANGE v. McFaddon, 11 U.S. (7 Cranch) 116 (1812); Compania Espanola de Navegacion Maritima, S.S. v. THE NAVEMAR, 303 U.S. 68 (1938); and Republic of Mexico v. Hoffman, 324 U.S. 30, 65 S. Ct. 530, 89 L. Ed. 729 (1945).*

In *Aqua Log*, this Court considered Georgia's claim of immunity in an admiralty case where logs owned by the sovereign were the subject of an *in rem* admiralty proceeding like this one. This Court discussed the relevance of foreign sovereign immunity in admiralty cases and quoted *The NAVEMAR,* 303 U.S. 68, 75-76 (1938), which involved a vessel claimed by the Spanish government. The Supreme Court in *The NAVEMAR* denied Spain's assertion of foreign sovereign immunity holding that "actual possession by some act of physical dominion or control in behalf of the Spanish government was needful . . . or at least some recognition on the part of the ship's officers that they were controlling the vessel and crew in behalf of their government. Both were lacking . . . . " (citations omitted).[9]

This Court in *Aqua Log* observed:

> Federal district and circuit courts have likewise held a foreign government cannot claim sovereign immunity with respect to a vessel not in its possession. *See United States v. Jardine,* 81 F.2d 745 (5th Cir. 1935); *THE CARLO POMA,* 259 F. 369 (2d Cir. 1919)

[9] *NAVEMAR* was distinguished in *Marx v. Government of Guam*, 866 F.2d 294 (9th Cir. 1989), but this Court declined to address *Marx* in its *Aqua Log* opinion, and *Marx* is distinguishable from this case as it did not involve an FSIA analysis. Moreover, in *Marx* sunken vessels actually existed; there was no dispute that Guam owned the vessels; and the vessels were located within the territorial waters of Guam and were thus under its control.

> (rev'd on other grounds 255 U.S. 219)); *The ATTUALITA,* 238 F. 909 (4th Cir. 1916); *The Johnson Lighterage Co. No. 24,* 231 F. 365 (D.N.J. 1916); *Long v. The Tampico,* 16 F. 491 (S.D.N.Y. 1883).

594 F.3d at 1335 n.8. The *Aqua Log* decision thus settles the matter here: Spain must have had actual possession of the *res* before it could demand foreign sovereign immunity and displace what would otherwise be the legitimate jurisdiction of federal admiralty courts to adjudicate maritime claims *in rem*.

The district court's faulty legal reasoning also ignored that the FSIA most certainly *does* contain a requirement of possession. Under section 1605(b) (the provision relevant to admiralty actions to enforce maritime liens) an *in personam* mechanism is only triggered when "notice of the suit is given . . . to the person, or his agent, *having possession* of the vessel or cargo against which the maritime lien is asserted." 28 U.S.C. § 1605(b)(1) (emphasis added). If no person representing a foreign sovereign (or its agent) is "in possession of the vessel or cargo," then there is no party to serve notice of the suit, and, thus an *in rem* proceeding may be instituted. That is precisely what occurred here.

Even if Congress had not thoughtfully included the possession language into 1605(b)(1), the Supreme Court has repeatedly held that Congress is assumed to have legislated the FSIA, as with other statutes, against the backdrop of common law sovereign immunity principles. *See Astoria Fed. Sav. & Loan Ass'n*

v. Solimino, 501 U.S. 104, 108 (1991); *Isbrandtsen Co. v. Johnson,* 343 U.S. 779, 783 (1952). Specifically, the Court has held that pre-FSIA common law rules of sovereign immunity survived the enactment of the FSIA and are enforceable today. *See Republic of Philippines v. Pimentel,* 128 S. Ct. 2180, 2190 (2008); *Permanent Mission of India to the United Nations v. City of New York,* 551 U.S. 193, 201 (2007) (examining "pre-FSIA international practice"). As this Court has noted, citing the United States Supreme Court in *Deep Sea Research,* actual possession for assertions of sovereign immunity is a common law requirement and was actually first enunciated by the Supreme Court regarding claims made to vessels and cargo. *Aqua Log,* 594 F.3d at 1334-1336. *See Deep Sea Research,* 523 U.S. at 507-08 (discussing *The DAVIS,* 77 U.S. (10 Wall.) 15, 20 (1869).

However the matter is viewed, the district court in stark contrast to this Court's later holding in *Aqua Log,* erred in its legal conclusion that Spain's lack of possession of the *res* was irrelevant. This conclusion distorted the district court's sovereign immunity analysis and led to an improper and clearly erroneous dismissal of the case. Thus, Odyssey requests this Court to reverse the district court's order dismissing the case and remand the case for proper adjudication of all claims.

[. . .]

III. THE DISTRICT COURT ERRED IN DISMISSING THIS *IN REM* ADMIRALTY PROCEEDING FOR LACK OF SUBJECT MATTER JURISDICTION WHERE THE MAJORITY OF THE *RES* WAS PRIVATELY OWNED CARGO AND WHERE SPAIN DID NOT PROVE OWNERSHIP OF ANY OF IT.

A. *Spain Cannot Bootstrap its Ownership of The Mercedes in Order to Assert that Private Cargo is also its Property.*

1. *The Majority of The MERCEDES Cargo was Private Property.*

Finding, erroneously, that The MERCEDES was not involved in commercial activity, the district court found that the "vessel's cargo . . . [is the] natural and legal patrimony of Spain." Doc.270:4. Irrespective of the standard of appellate review applied here, this finding was factually and legally erroneous and very clearly in contradiction of the weight of the record evidence.

It is by no means clear that Spain, in its verified claim filed before the district court, ever asserted ownership over the private cargo aboard The MERCEDES. *See* Doc.13:1 (claiming "cargo or other property of the Kingdom of Spain on or in sunken vessels"). Nowhere in its filings did Spain produce any evidence whatsoever showing that it had become the owner (whether by subrogation, espousal, or otherwise) of what was once private cargo aboard The MERCEDES. The district court specifically declined to make such a finding, Doc.270:26, preferring,

instead, to automatically assimilate all private cargo on The MERCEDES as Spanish "natural and legal patrimony." Doc.270:4.

The record evidence provided by Odyssey, as well as by over twenty descendant claimants, Doc.164, 168, 169 & 176, proved that the vast majority of the cargo carried aboard The MERCEDES, when it sank in 1804, was privately owned. *See* Doc.138-30:19. This evidence is derived from uncontradicted material from Spain's own archives and official documents. By the Spanish government's own contemporaneous estimate (in diplomatic correspondence with the British government in 1804 and 1805), over 75% of the cargo on The MERCEDES was privately held. Doc.138-30:19; 138-45:4-7. As noted, the cargo manifest for The MERCEDES lists 173 receipts identifying the owners of the cargo and showing the freight charges paid. These receipts clearly indicate that at least 75% of the cargo (measured by value) was privately owned and commercially shipped. Doc.138-30:26-28; 138-63:12-13; 138-61; 232-5. Failing to address the manifest, and completely missing the descendants relationship to the property at issue, the district court erroneously identified the descendants claiming ownership here as "descendants of those aboard The MERCEDES." Doc.270:8. The district court's failure to acknowledge the manifest and the property interests of descendant claimants was clearly erroneous.

If evidence contemporaneous with The MERCEDES' loss was not enough to persuade, Spanish official documents prepared just before it instituted its claim in this litigation reveal that the vast majority of the cargo carried in the fleet of The MERCEDES was *not* for the account of the Spanish government. *See* Doc.232-5:10&16 (2006 document prepared by the Spanish *Guardia Civil* showing that over 70% of The MERCEDES' cargo was "treasures and goods of private interests.").

Spain did not prove below that it owned the cargo which is the *res* in this case. Instead, it made a general reference to its "natural and legal patrimony" and "patrimonial interests," Doc.270:4,19, however those are defined. Legally, however, Spain's interest in The MERCEDES is analytically distinguished from the private cargo which was placed aboard that vessel, and the district court's failure to make that distinction was clearly erroneous.

2. *Vessel and Cargo Interests have been Consistently Distinguished in the FSIA, SMCA, and General Maritime Law.*

The FSIA itself draws a distinction between vessel and cargo interests, albeit in a provision that the district court declined to regard as relevant. FSIA section 1605(b) provides that: "A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien

against a vessel *or cargo* of the foreign state. . . ." 28 U.S.C. § 1605(b) (emphasis added).[17] Obviously, if Congress had believed, in drafting the FSIA, that all cargo aboard a state-owned vessel would be considered state property, there would have been no need to distinguish the two interests. *See id*. § 1605(b)(2) (determining "the existence of the foreign state's interest" in "vessel or cargo").

Likewise, the Sunken Military Craft Act, Pub.L. 108-375, Div. A, Title XIV, §§ 1401-1408, 118 Stat. 2094 (2004), codified at 10 U.S.C. § 113 note, draws a distinction between vessel and cargo interests. Under the SMCA, "associated contents" of a shipwreck (including cargo) are only included within the ambit of "sunken military craft," "*if* title thereto has *not* been abandoned or transferred by the government concerned." *Id.* § 1408(3)(C) (emphasis added). Congress's conditionality (the word "if") is significant here, and indicates that title of cargo aboard a state-owned ship must rest with the state to be assimilated to the vessel. Private property situated aboard a military craft does not, under the SMCA, become state property when that ship sinks.

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[17] *See also* the balance of 28 U.S.C. § 1605(b), which draws a distinction between vessel and cargo interests, no less than four times. *See also* 28 U.S.C. § 1391(f)(2) ("A civil action against a foreign state . . . may be brought . . . (2) in any judicial district in which the vessel *or cargo* of a foreign state is situated, if the claim is asserted under section 1605(b) of this title") (emphasis added).

The FSIA and SMCA provisions are consistent with general maritime law's long-standing distinction between vessel and cargo interests, as recognized by the Supreme Court and this Court in related sovereign immunity contexts. As early as 1822, the Supreme Court held that a foreign sovereign's assertion of immunity of a public vessel does not extend to private cargo, such as to oust the jurisdiction of U.S. courts sitting in admiralty. *The SANTISSIMA TRINIDAD,* 20 U.S. (7 Wheat.) 283, 254 (1822) ("whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our Courts"). *See also Borgships Inc. v. M/V MACARENA*; 1993 WL 408342, at *3 (E.D. La. Oct. 4, 1993) ("[FSIA] Section 1609 affords immunity from prejudgment attachment only to the property of a foreign state and claimants have failed to provide any authority for the proposition that property not belonging to a foreign state but carried aboard a vessel belonging to a foreign state is immune from seizure.").

In the specific context of salvage, U.S. admiralty courts have consistently held that a salvor's interests in recovered cargo are analytically distinct from salvage services offered to the vessel. *See The ST. PAUL,* 86 F. 340, 341 (2d Cir. 1898) (separate salvage awards for cargo and hull); Martin J. Norris, *The Law of Salvage,* 3A BENEDICT ON ADMIRALTY §27 (2009). This rule has been applied as well to salvage of sunken shipwrecks. *See, e.g., R.M.S. Titanic, Inc. v.*

Haver, 171 F.3d 943, 964 (4th Cir. 1999) ("to exercise *in rem* jurisdiction over a ship or its cargo, the ship or cargo must be within the district in which the *in rem* complaint is filed."); *R.M.S. Titanic, Inc. v. Unidentified, Wrecked Vessel,* 531 F. Supp. 2d 691, 692-93 (E.D. Va. 2007) (separating cargo interests); *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.,* 974 F.2d 450, 467-68 (4th Cir. 1992) (salvage award calculated for various parcels of cargo); *Bemis v. RMS LUSITANIA,* 88 F. Supp. 2d 1042, 1047-48, 1053-54 (E.D. Va. 1995) (right to salvage hull did not include cargo). As Chief Justice Marshall ruled in The NEREIDE, 13 U.S. 388, 431 (1815), "[t]he characters of the vessel and cargo remain as distinct in this as in any other case."

Indeed, this Court recently acknowledged that a sovereign could refuse salvage services only for its own property aboard a sunken craft. *International Aircraft Recovery, L.L.C. v. Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255, 1262 (11th Cir. 2000) ("the owner of a vessel in marine peril [may] decline the assistance of others *so long as only the owner's property interests are at stake.*") (emphasis added). Apparent in this statement is the judicial recognition that a sunken craft might represent a multitude of interests (the hull and various consignments of cargo), and that a sovereign owner of the craft (the United States in that case) cannot purport also to assert ownership over private cargo carried aboard, thus refusing salvage for that private cargo. Likewise, ownership by the foreign sovereign of a

sunken craft does not cloak the private cargo aboard with immunity from the jurisdiction of U.S. admiralty courts to adjudicate maritime claims and liens to that private property.

B. *Adjudicating the Interests of Owners of Private Cargo on The MERCEDES does not affect Spain's Legitimate Sovereign Interests.*

The district court, relying on *Republic of Philippines v. Pimentel,* 128 S. Ct. 2180 (2008), held that adjudication of the rights of private claimants would "necessarily implicate Spain's rights to the property" and "would frustrate the FSIA's goals and impermissibly prejudice Spain." Doc.270:27. The district court's legal analysis is profoundly flawed.

Importantly, and as already briefed, *see supra* § II.A.2, it is *Spain* that bears the burden of proving that the property at issue here is *its* property. It should also be recalled it was *Spain* that filed a verified claim in this proceeding. Doc.13. Spain is hardly an "absent sovereign" in these proceedings, whose interests might be "injur[ed]" or "substantially prejudice[d]," as the Supreme Court was concerned with in *Pimentel. See* 128 S. Ct. at 2184, 2189, 2191-92.[18] According to Supplemental Admiralty Rule C, "a

[18] *Pimentel* concerned an FRCP 19 joinder in an interpleader proceeding concerning *in personam* creditor claims to funds situated in a U.S. bank. *See* 128 S. Ct. at 1284. The Philippines

(Continued on following page)

person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest" and that "statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or right to defend the action." FRCP Supp. Adm. R. C(6)(a)(i) & (ii). Nowhere in Spain's verified claim did it purport to assert ownership over cargo that was privately shipped or consigned on The MERCEDES. Doc.13:1 (Spain asserting rights "in cargo or other property *of The Kingdom of Spain* on or in its sunken vessels") (emphasis added). It can hardly be deemed prejudicial to Spain to hold it to the proofs of its own claim.

The logical consequence of the district court's ruling would be that a foreign sovereign could insert itself into any *in rem*, collective proceeding in a U.S. federal court (whether in admiralty, forfeiture or bankruptcy), file a claim, and then assert that any adjudication would prejudice its interests and that, therefore, the proceeding should be terminated for lack of subject-matter jurisdiction. The Supreme Court certainly did not countenance such a result in its *Pimentel* opinion. The Court was careful, for example, to indicate that a foreign sovereign's assertion of a claim cannot be "frivolous." 128 S. Ct. at 1291. Spain will obviously assert in this appeal that

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had been originally sued as a *defendant,* but that was properly dismissed because of foreign sovereign immunity. *Id.* at 1286.

its claim of current ownership over private cargo that was shipped on The MERCEDES is not "frivolous." But nowhere in its filings, and more importantly, nowhere in the district court's ruling is there a finding of how exactly Spain came to acquire title to this private cargo, other than through a blanket assertion that it is Spain's "natural and legal patrimony." Doc.207:4.[19]

Even more fundamentally, principles of international "comity" – which significantly motivated the Supreme Court in *Pimentel, see* 128 S. Ct. at 2190 – would not be offended here in adjudicating the interests in private cargo aboard The MERCEDES. This is not an instance, as in *Pimentel,* where there are parallel proceedings in a foreign court to settle the same matters at issue, and so there is no risk of "piecemeal litigation and inconsistent, conflicting judgments." 128 S. Ct. at 2193. As already observed, *see supra* Statement of Jurisdiction at A., United States courts have routinely adjudicated the rights and interests of the world in *in rem* proceedings

[19] The only possible ground that Spain could assert is that it acquired rights to private cargo shipped on The MERCEDES via subrogation when it allegedly "offered to compensate those who suffered losses." Doc.270:26. But the district court did not embrace that theory, *id*., and for good reason: there was no evidence presented that Spain ever actually paid such an indemnity, which is the requisite for a subrogation right. *See* Doc.179-1:14-16. *See also Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.,* 56 F.3d at 575-76 (4th Cir. 1995) (requiring strong evidence for a subrogation claim).

concerning high seas salvage, consistent with comity and international law. *See Treasure Salvors, Inc. v The Unidentified Wrecked & Abandoned Sailing Vessel,* 640 F.2d 560, 567 (5th Cir. 1981) and *R.M.S. Titanic,* 171 F.3d at 966-67.

In short, nothing prevents a federal admiralty court from adjudicating maritime claims involving private cargo even if it had been carried on a state-owned vessel. Segregation of cargo and hull interests, as well as sovereign and private consignments, is recognized under the FSIA, SMCA, and general international maritime law. Given Spain's posture in this case as a claimant in an *in rem* proceeding, no "impermissibl[e] prejudice" should accrue to Spain.

[. . .]

IV. THE DISTRICT COURT ERRED IN HOLDING THAT IT LACKED SUBJECT MATTER JURISDICTION OVER SALVAGED PROPERTY, AND AT THE SAME TIME, ORDERING TRANSFER OF THAT PROPERTY TO A FOREIGN SOVEREIGN THAT WAS NOT IN POSSESSION OF IT AT THE TIME OF SALVAGE AND ARREST.

A. *The District Court's Order is Manifestly Contradictory.*

The district court ruled that it lacked subject matter jurisdiction and that the warrant of arrest be vacated, yet ordered "the substitute custodian, Odyssey, . . . to return the *res* to Spain. . . ." Doc.270:5. It is uncontradicted that the *res* was not in the possession

of Spain (or its agents) at the time of Odyssey's discovery of the site and the recovery operations. Doc.1:2-4, 6-7(¶¶2,6,8,17,21). It was Odyssey that brought the *res* within the jurisdiction of the district court from the floor of the Atlantic Ocean. Doc.1:2(¶4); Doc.5 (order for issuance of arrest warrant); Doc.8 (order appointing Odyssey substitute custodian of the *res).*

The district court cannot *both* hold that it lacks jurisdiction over the *res* (granting a dismissal under FRCP 12(b)(1)), and then order the "return" of the *res* to Spain when Spain was not in possession of the *res* at the time of its arrest. It would be one thing, of course, if Spain's (or its agent's) possession of the *res* had been ousted by Odyssey's filing of an arrest,[22] but that was manifestly not the case here. The district court's order to "return the *res* to Spain," Doc.270:5, acted as a substantive ruling on the merits, resolving all parties' interests in the cargo, which is something the district court cannot purport to do if it lacked subject matter jurisdiction. *See Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94 (1998); *Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law,

[22] Indeed, it is precisely such a scenario – where the possession of property by a foreign sovereign (or its agent) is disrupted by an attachment or arrest – that motivated Congress in legislating FSIA sections 1605 and 1609. *See* 1976 U.S.C.C.A.N. at 6619, 6626.

and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."); *University of South Alabama v. American Tobacco Co.,* 168 F.3d 405, 410 (11th Cir. 1999) ("Simply put, once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue.") (citing *Steel Co.* and *McCardle).*

B. *The Proper Disposition of the Case, if Subject Matter Jurisdiction is Absent, is to Return the Parties* Status Quo Ante *the Admiralty Arrest.*

If the district court truly believed that it lacked subject matter jurisdiction over Odyssey's *in rem* admiralty complaint, and the admiralty arrest was to be vacated, then the proper course would have been to return the parties to their position just prior to the arrest being instituted. That would mean that the res would be returned to the party that had possession of it and had brought it into the jurisdiction of the court. That party was Odyssey, not Spain.[23]

This is the only possible result countenanced by the FRCP's Supplemental Admiralty Rules. *See* FRCP Supp. Adm. R. E(5)(c) (*res* is "released" "upon the dismissal or discontinuance of the action"); *see also*

[23] Spain would hardly be without a remedy in such a situation. It could institute a replevin action as a plaintiff, and in such a proceeding its rights, as well as the interests of the descendant claimants and Odyssey, could be adjudicated.

M.D. Fla. Local Adm. R. 7.05(i)(3) (where action is "dismiss[ed] or discontinu[ed]"). Nothing in the Federal Rules grants a district court, in cases where there is no subject matter jurisdiction, the power to transfer possession of a *res* to any party other than the one that had actual possession of it at the moment of arrest. *See United States v. Alcon Laboratories,* 636 F.2d 876, 883 (1st Cir. 1981). To grant such authority would permit federal courts to substantively exercise jurisdiction, where none ostensibly exists. Here, it would mean that under the guise of denying jurisdiction, Spain has been awarded valuable property which was not its own without satisfying the interests of the descendant claimants or Odyssey's maritime salvage lien.

[. . .]